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United States Supreme Court

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

AT

DECEMBER TERM 1862.

By J. S. BLACK, LL.D.

VOL. II.

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1903

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Entered according to Act of Congress in the year 1868,

By J. S. BLACK.

in the Clerk's Office of the District Court of the District of Columbia.

REPRINTED IN TAIWAN

PREFATORY NOTE.

THE defects of this volume should explain themselves. While it is considerably larger than the last one, it contains a less number of cases, and most of them are reported with the utmost brevity. This could not be helped. *Castillero* vs. *United States*, occupies a large part of the book, though compressed within limits as narrow as common fairness would permit. Justice to the majority of the Court required a statement of the facts with the documentary evidence on which the decree was founded, and a short abridgement of the points made for the United States. This being done, it was due to the dissenting Judges and the counsel for the claimants that the arguments on the other side should be given with about equal fulness.

But the inevitable length of that case made it necessary to exercise a strict economy of space in reporting the others. In nearly all, the arguments of counsel were condensed, arranged, and otherwise prepared for insertion, but were omitted when it was found that room could not be made for them.

It will be seen that the Judges, following a custom long established in this Court, have made their statements so full that in most cases the opinion is a report as well as a decision. The reader does not need to be told in each several case where he must look for the facts. It is enough to say now, once for all, that when the whole case is elaborately set forth by the Court, it cannot be necessary to give the same version over again, or proper to give a different one.

The members of the profession should know that their thanks are due to *Mr. O'Conor*, *Mr. Dana*, and *Mr. Carlisle*, for putting into a condensed and readable form the admirable arguments made by the first named gentleman in *Castillero* vs. *United States*, and by the two last in the *Prize Cases*.

MEMORANDA.

The two seats on the Bench which were unoccupied at the close of the last term were filled during the vacation by the appointments of the Honorable SAMUEL F. MILLER, of Iowa, and the Honorable DAVID DAVIS, of Illinois.

An Act of Congress having been passed authorizing a tenth Judge, the Honorable STEPHEN J. FIELD, of California, was appointed.

JUDGES AND OFFICERS OF THE SUPREME COURT

AT DECEMBER TERM, 1862.

CHIEF JUSTICE.

HON. ROGER B. TANEY, of Maryland.

JUSTICES.

HON. JAMES M. WAYNE, of Georgia.
HON. JOHN CATRON, of Tennessee.
HON. SAMUEL NELSON, of New York.
HON. ROBERT C. GRIER, of Pennsylvania.
HON. NATHAN CLIFFORD, of Maine.
HON. NOAH M. SWAYNE, of Ohio.
HON. SAMUEL F. MILLER, of Iowa.
HON. DAVID DAVIS, of Illinois.

ATTORNEY-GENERAL.

HON. EDWARD BATES, of Missouri.

CLERK.

W. T. CARROLL, ESQ., of Washington City.

MARSHAL.

W. H. LAMON, of Illinois.

ORDER OF COURT.

There having been two Associate Justices of this Court appointed since its last session, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said Court among the Circuits, agreeably to the Act of Congress in such case made and provided; and that such allotment be entered of record, viz.:

For the First Circuit,		NATHAN CLIFFORD,	Associate Justice
"	Second "	SAMUEL NELSON,	" "
"	Third "	ROBERT C. GRIER,	" "
"	Fourth "	ROGER B. TANEY,	Chief Justice.
"	Fifth "	JAS. M. WAYNE,	Associate Justice.
"	Sixth "	JOHN CATRON,	" "
"	Seventh "	NOAH M. SWAYNE,	" "
"	Eighth "	DAVID DAVIS,	" "
"	Ninth "	SAMUEL F. MILLER,	" "
"	Tenth "	STEPHEN J. FIELD,	" "

EXECUTIVE MANSION,

Washington, June 22, 1863.

WHEREAS, The Act of Congress approved the 3d day of March, A. D. 1863, entitled "An Act to provide Circuit Courts for the Districts of California and Oregon, and for other purposes," authorized the appointment of one additional Associate Justice of the Supreme Court of the United States, and provided that the Districts of California and Oregon should constitute the

Tenth Circuit, and that the other circuits should remain as then constituted by law. AND WHEREAS, *Stephen J. Field* was appointed the said additional Associate Justice of the Supreme Court since the last adjournment of said Court, and consequently he was not allotted to the said Circuit according to the fifth section of the Act of Congress, entitled an "Act to amend the judicial system of the United States, approved the 29th day April, 1802." Now I, ABRAHAM LINCOLN, President of the United States, under the authority of said section, do allot the said Associate Justice, Stephen J. Field, to the said Tenth Circuit.

ABRAHAM LINCOLN.

Attest,

TITIAN J. COFFEY,

Attorney-General, *ad interim*.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1863.

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Nathaniel A. Cowdry,	*New York.*
Jas. M. Woolworth,	*Nebraska.*
James Roberts,	*Illinois.*
Benj. F. James,	*Illinois.*
S. V. White,	*Iowa.*
Jas. M. Spencer,	*Michigan.*
Wm. B. Allison,	*Iowa.*
Nathan C. Giffin,	*New York.*
David Rorer,	*Iowa.*
Henry C. Henderson,	*Iowa.*
John T. Graves,	*Texas.*
W. K. Upham,	*Ohio.*
Robert Sherrard, Jr.,	*Ohio.*
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SAML. R. BOND,	*Minnesota.*
DAVID A. SECOMBE,	*Minnesota.*
JOHN P. C. SHANKS,	*Indiana.*
JAMES N. TEMPLER,	*Indiana.*
JOHN JOLLIFFE,	*District of Columbia.*

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Concurred in per Justices Wayne and Clifford.

Calais Steamboat Company v. *Van Pell's Adm'r.*

Dissenting opinion per Mr. Justice Clifford.
Concurred in per Mr. Justice Miller.

Ward v. *Chamberlain.*

Dissenting opinion per Mr. Justice Grier.
Concurred in per Mr. Justice Catron.

Castillero v. *United States.*

Dissenting opinions per Justices Catron and Wayne.
Concurred in per Mr. Justice Grier.

Miller v. *United States* (*The Prize Cases.*)

Dissenting opinion per Mr. Justice Nelson.
Concurred in per Mr. Chief Justice Taney, and Justices Catron and Clifford.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1862.

THE UNITED STATES *vs.* ANDRES CASTILLERO.

ANDRES CASTILLERO *vs.* THE UNITED STATES.

1. Paredes, President of Mexico, from 15th December, 1845, until 29th July, 1846, exercised extraordinary powers, but it is not certain that such of his acts as violated the law were ever ratified:—*Semble*, That such ratification was necessary to make his acts valid as against the government.
2. Conceding the power of the acting President of the Republic, to make a grant of land in California, the several documents attesting any supposed grant are to be examined with care, since it thus becomes a question of construction whether it was or was not intended to be a grant.
3. A party asserting that he had discovered and denounced a valuable mine in California, presented a memorial to the *Junta de Mineria*, asking a loan of money and materials to work it, and also requesting the *Junta* to recommend that the government grant him as a colonist two square leagues on his mining possession. The Junta communicated the memorial to the Minister of Justice, with their approval of the loan, &c.; but declined to give any opinion upon the propriety of granting the land. The Minister of Justice in the name of the President concurred with the Junta, and with respect to the land, ordered the proper measures to be taken by the Minister of Relations, "with the understanding that the government accedes to the petition." The Minister of Relations made out and gave to the applicant a dispatch addressed to the Governor of California reciting the previous

proceedings and declaring that he did so in order that the Governor might put the applicant in possession of the two square leagues "in conformity with the laws and decrees on the subject of colonization." The dispatch was never delivered to the Governor:—*Held*, That this was not a grant for two leagues of land nor intended to be so.

4. The legal effect of the dispatch of the Minister of Relations was merely to authorize a regular application to the Governor by petition under the laws of 1824 and 1828 to be followed by such steps as those laws require, and a grant of land if the Governor should ascertain that it was proper to make one.

5 To say that these proceedings at the City of Mexico were in themselves an absolute grant, either legal or equitable, of the land claimed under them, is a manifest error which this Court cannot be expected to sanction.

6. The case of *United States* vs. *Castillero*, (23 How. 468,) reviewed and shown to be entirely different from this in its facts, and in the legal principles applicable to it.

7. If the mine was on private property, the Governor was wholly without power to make a grant of land there, for his jurisdiction under the colonization laws extends only so far as to make grants of public lands.

8. Nor would it benefit the claimant, if it were now shown that it was public land because his own representations prove that he fully believed it to be private property.

9. A mining right or privilege under the Mexican ordinances relating to that subject, is a title to land within the meaning of the Act of 1851, and therefore the Board of Land Commissioners had jurisdiction to investigate a claim to such right.

10. The ordinances made and established by the King of Spain at Madrid in 1783, prescribe the mode of acquiring titles to mines, and were in force throughout the Republic of Mexico at the date of the American conquest of California.

11 A strict compliance with the terms and conditions of those ordinances is required by the ordinances themselves, and is shown to be necessary on general principles by all the writers on the subject.

12 Registry is the basis of title to a mine, and no mine can be lawfully worked until it is registered; nor can any title thereto be acquired either by the discoverer or by any other person without a registry.

13 Registry consists of an entry in a book kept by the proper public authority

14. Claimant of a mining right filed with his petition an espediente of his title certified by an Alcalde to be a true copy to the letter from the original in his office. It was afterwards proved that the expediente and the certificate were in the handwriting of a party interested, who had copied them from papers furnished by another party also interested, and that the Alcalde had signed the certificate without seeing any original:—*Held*, That this document is entirely unworthy of credit.

15 Claimant produced another espediente certified by a Mexican Alcalde who could not write nor read writing. This expediente differed in some particulars from that which the claimant filed with his petition. The Alcalde, though a witness, was not asked to verify the document. It was in the handwriting of another witness who swore to that fact, but did not testify from what he had copied it:—*Held*, That such a document, so proved, is entitled to very little consideration.

16. Another espediente was produced at a subsequent period which the claimant alleged to be the original from the archives, though it differed materially from the two others previously alleged to be copies. A witness testified that he found it among the records in January, 1851, but it bore no official marks, it was never seen among the archives previous to that time, the claimant's counsel had made affidavit in December, 1850, that the original expediente was in Mexico and could not be produced, nor a copy of it furnished, though it had been diligently sought for:—*Held*, That this document was not sufficiently proved, and that the testimony of Mexican officers and assisting witnesses who swore to its execution by them at or about the time of its date did not establish it as an official paper.

17 . fourth and still different expediente was introduced by claimant near the close of the case. It was certified (all but the act of possession) by an Alcalde who admitted on his oath that the papers had been sent to him from the mine, and he had signed the certificates without knowing what they were. The Mexican officer and his assisting witnesses were then called to prove that the act of possession in this expediente was a duplicate original Upon these and other circumstances it was:—*Held*, That this expediente could not be regarded as a genuine document, and that its production at that late stage of the case, added to its glaring inconsistency with the evidence previously given, had the effect, not only to impair all confidence in the first expediente, but to discredit all the witnesses who had sworn to the papers of which it was composed

18. Title to a mine is vested by the adjudication or decree of the proper tribunal in a case duly presented for decision, and by the registry of the adjudication, together with the proceedings on which it is founded.

19. The mere fact of discovery without such adjudication and registry, gives no title to the discoverer, though it is also true that without proof of discovery there can be no adjudication in his favor.

20. To complete the adjudication and carry it into effect, the boundaries must be fixed; else the title or claim, like other indefinite interests in lands, will be void for uncertainty; and this rule applies to mines situate on public as well as to those on private lands.

21. An Alcalde had no jurisdiction under the mining laws and could make no title to a mine. The tribunal empowered to exercise this jurisdiction was the Mining Deputation of the territory or the nearest one thereto.

22. The fact that no Mining Deputation nor no Courts of First Instance were established in California, would show that a law, giving jurisdiction over mines to an Alcalde, might have been a convenience to the people, but it does not show that such a law existed.

23. It may be safely inferred from the character and history of Mexico, that its supreme government reserved to itself the power over its mines, and purposely withheld all jurisdiction of that nature from the local authorities of its distant and frontier territories.

24. If the Alcalde had jurisdiction it would be necessary for the claimant to show that such jurisdiction was exercised in accordance with the requirements of the mining ordinances.

25. Some of the provisions of those ordinances are doubtless directory, and others conditions subsequent, but some of them are clearly conditions precedent.

26 Those provisions which appertain to the registry of the mine and the action of the tribunal thereon, and in respect to the judicial possession of it, are conditions precedent, and a discoverer cannot support a title without showing a substantial compliance. Want of registry and omission to mark boundaries on the ground are fatal defects in a mining title.

27 A discoverer who neglects to have his title adjudicated and registered agreeably to the ordinance, or to have his pertenencias measured and marked, does not by such negligence forfeit his title; but simply fails to acquire any title which could be the subject of forfeiture.

28. Claimant went to Mexico six months after the alleged date of his mining title. He petitioned the Junta for aid and asked a land grant, as mentioned in note 3. He asserted that he had discovered and denounced a mine, but produced no title papers, and falsely stated that the mine was in the Mission of Santa Clara, suppressing the fact that it was on a private rancho five leagues distant from that Mission. He requested the Junta to recommend the approval of the possession of the mine which had been given him by the local authorities of California The Junta agreed to furnish the assistance and recommended the approval or confirmation. The President *approved of the agreement* made by the Junta in order to commence *working* the mine (as one of his ministers said) or (according to another) for the *exploration* of the mine, but made no decree concerning the title:—*Held*, That these proceedings were not a confirmation or approval of any title which the claimant might previously have obtained from an Alcalde in California, and therefore, the documents produced to show that he had such a title must stand or fall by their own contents and the evidence which supports them on their original merits.

29 The Court discusses numerous acts of the original claimant and of parties interested in the mine, and especially those disclosed in a correspondence between them, and holds these acts to be evidence that the claimant and his aliences knew full well the invalidity of the title which he and they were setting up.

30. The assurance given by the Mexican Government when the treaty of peace was under negotiation, that no title for land in California had been made of later date than 13th May, 1846; he assent to the tenth article which contained a similar declaration; and her acceptance of the subsequent explanations contained in a protocol which promised the protection of the American Government only to such titles as were made before that time, prove that Mexico herself did know, and must have known, that the pretensions of the claimants under a title of later date were unfounded.

These were cross appeals, severally taken by the United States, and by the claimants, from a decree of the District Court for the Northern District of California, in a claim of Andres Castillero, for land, under the Act of March 3, 1851.

Before the commencement of the proceeding, the claim had been divided, and most of the shares in it were held by other persons, who, with Castillero, occupied the lands under the

name of the New Almaden Mining Company. But the petition to the Board of Land Commissioners was presented by the attorneys of the company in the name of Castillero alone, for his benefit, and the benefit of those holding under him.

The petition set forth that Castillero discovered a mine of cinnabar in 1845; that having formed a company to work it, he, on the 22d of November, and 3d of December, 1845, denounced it, and on the 30th of December received juridical possession in due form from the magistrate of that jurisdiction; that the record of his mining possession was afterwards submitted to the Junta de Fomento y Administracion de Mineria, who declared it to be legal, and recommended to the Executive not only that it be confirmed, but that two square leagues be granted him on the surface of his mining possession; that the grant of two square leagues was made on the 20th of May, 1846, and an order or patent of title issued to him on the 23d, with which he started to take possession, but was prevented by the war; that as soon as possible he got a survey made; that by virtue of these facts he acquired a perfect title, under which he and his grantees have held possession ever since 1845, expending immense sums of money upon it. The petition concludes with a prayer that the Land Commissioner will confirm to him "the two square leagues of land, as embraced in his mining possession and grant as aforesaid."

Along with the petition the claimants filed copies of the title documents under which they claimed the mine and lands. The mining title consisted of the following papers united together in the form of an expediente.

"*Señor alcalde of first nomination:*

"Andres Castillero, captain of permanent cavalry and at present resident in this department, before your notorious justification makes representation: That having discovered a vein of silver, with a *ley* of gold, on the rancho pertaining to José Reyes Berreyesa, retired sergeant of the Presidio Company of San Francisco, and wishing to work it in company, I request that, in conformity with the ordinance on mining, you will be pleased to fix up notices in public places of the jurisdiction, in order to make sure of my right when the time

of the juridical possession may arrive, according to the laws on the matter.

"I pray you to provide in conformity, in which I will receive favor and justice; admitting this on common paper, there being none of the corresponding stamp.

"Pueblo of San José Guadalupe, November twenty-second, eighteen hundred and forty-five.

"ANDRES CASTILLERO."

"This is a copy of the original to which I refer, signing it with two assisting witnesses, in the Pueblo of San José Guadalupe, on the 13th of January, 1846.

"PEDRO CHABOLLA.

"Assisting witnesses—
Sansevain,
José Suñol."

"*Señor alcalde of first nomination:*

"I, Andres Castillero, permanent captain of cavalry, before your well-known justification, appear and say: That on opening the mine which I previously denounced in this court, I have taken out, besides silver with a ley of gold, liquid quicksilver, in the presence of several bystanders, whom I may summon on the proper occasion.

"And considering it necessary for the security of my right so to do, I have to request of you, that uniting this representation to the denouncement, it may be placed on file, it not going on stamped paper, because there is none.

"I pray you to take measures to this effect, in which I will receive favor and grace,

"Santa Clara, December 3, 1845.

"ANDRES CASTILLERO."

"This is a copy of the original to which I refer, signing it with the witnesses of my assistance, in the Pueblo of San José Guadalupe, on the 13th of January, 1846.

PEDRO CHABOLLA.

"Assisting witnesses:
P. Sansevain,
José Suñol."

"There being no deputation on mining in the Department of California, and this being the only time since the settlement of Upper California, that a mine has been worked in conformity with the laws —and there being no *Juez de Letras* (Professional Judge) in the Sec-

ond District, I, the Alcalde of first Nomination, citizen Antonia Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine known by the name of Santa Clara, in this jurisdiction, situated on the Rancho of the retired sergeant José Reyes Berreyesa, for the time having expired, which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this court has; and as the laws now in force so strongly recommended the protection of an article so necessary for the amalgamation of gold and silver in the Republic, I have granted three thousand varas of land in all directions, subject to what the general ordinance of mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the expediente, deposited in the Archives under my charge. This not going on stamped paper, because there is none, as prescribed by law.

"Jazgado of San José Guadalupe, December 30, 1845.

"ANTONIO MARIA PICO.

"Assisting witnesses:

Antonio Suñol,
José Noriega."

"I have received of Don Andres Castillero the sum of twenty-five dollars, on account of the fees for the possession of the quicksilver, mine, which is in this jurisdiction, under my charge, named Santa Clara.

"Court House of San José Guadalupe, December 30, 1845.

"$25. "ANTONIO MARIA PICO."

"Writing of partnership executed by Don Andres Castillero, captain of permanent cavalry, with the commanding general, Don José Castro, and the Senores Secundino Robles and Teodoro Robles, and a voluntary grant which the partners make perpetually to the Rev. Father Fria, José Maria del Refugio Suarez del Real, of a mine of silver, gold, and quicksilver, in the Rancho of Don José Reyes Berreyesa, in the jurisdiction of the Pueblo of San José Guadalupe

"*Art.* 1. Don Andres Castillero, conforming in all respects to the ordinance of mining, forms a regular perpetual partnership with the said persons in this form: The half of the mine, which is that of which he can dispose, will be divided in three parts, in this manner; four shares to Don José Castro; four shares to Senores Secundino and Teodoro Robles; and the other four shares to the Rev. Father José Ma. R. S. del Real, as a perpetual donation.

"*Art.* 2. Neither of the partners can sell or alienate any of his shares, so that he who may do so shall lose his right, which shall revert to the other partners.

"*Art.* 3. The expenses shall be borne in proportion to the shares, a formal account being kept by an accountant, who will be paid from the common fund.

"*Art.* 4. That prescribed by the ordinance of mining being complied with in every thing, whatever difference may arise will be decided by the partners themselves.

"*Art.* 5. Don Andres Castillero will direct the labors expenses, and works, and in his absence the Rev. Father Friar José Maria R S del Real.

"*Art.* 6. Of the products, no larger quantities will be taken out tl an are necessary for the arrangement of the negotiation until the w.rks may be regulated, and whatever the quantity may be, it must b· with the consent of all the partners until the negotiation may be a: ranged.

"*Art.* 7. These agreements will be authenticated by the prefect of tl e second district, Don Manuel Castro, the original document being d. posited in the archives of the district, (*partido,*) a copy certified b. his honor being left with the persons interested.

"Mission of Santa Clara, November 2d, one thou:and eight hun-d.:d and forty-five.

"ANDRES CASTILLERO

"For the comd'g general, Don José Castro,

"ANDRES CASTILLERO,

"JOSE MARIA DEL R. S. DEL REAL

"For the Senores Secundino Robles and Teodoro Robles.

"FRANCISCO ARCE

"It is a copy of the original, to which I refer.

"Santa Clara, December 8, 1845.

"MANUEL CASTRO.

"Antonio M. Pico"

To this expediente was appended the following certificate by James W. Weekes, who was then acting as Alcalde of San José.

"COURT OF THE JUSTICE OF THE PEACE,

"*San José Guadalupe, Upper California.*

"I certify in due form that the foregoing is a faithful copy made to the letter from its original, the "expediente" of the mine of Santa Clara or New Almaden, which exists in the archives under my charge, to which I refer. And in testimony thereof, I have signed it this twentieth day of January, one thousand eight hundred and forty-eight.

"JAMES WEEKES, *Alcalde.*"

Weekes being called by the United States as a witness, testified that the body of the papers, as well as the certificates, were written by James Alexander Forbes, then one of the complainants, and that he (Weekes) had signed the certificate without seeing any original, but merely because Forbes requested him to do so, and in the belief that such a request would not be made unless it was right. J. A. Forbes swore that he made the copy, not from official papers, but from papers furnished him by Alexander Forbes, another claimant. J. A. Forbes, being British vice-consul, added to the certificate of Weekes the following certificate of his own.

"BRITISH VICE CONSULATE FOR CALIFORNIA,
San Francisco,

"I hereby certify that the signature to the above certificate is the true and proper handwriting of the person it represents, and that it is worthy of all faith and credit.

"In witness whereof, I have hereunto placed my hand and official seal this twenty-first day of January, one thousand eight hundred and forty-eight.

"JAS. ALEXANDER FORBES,
"Vice Consul."

SEAL OF H. B. M. VICE CONSULATE.

After the document was made and so certified it was returned to Alexander Forbes, who took it to Tepic, in Mexico, and there procured for it the following additional certificates:

"JESUS VEJAR, NOTARY PUBLIC.

"I certify and assure that the last preceding signature of the Senor Vice Consul, Don James Alexander Forbes, is his own, which said Senor is accustomed to use, I having become acquainted with it when I knew him during his stay in this city, on the way to Upper California, by various acts which he executed in the house of Messrs. Barron, Forbes & Co.

"And at the request of the same persons I affix my notarial mark and signature to this testimony, in Tepic, on the fifteenth of March, one thousand eight hundred and fifty.

"JESUS VEJAR."

"We, the Constitutional First Alcalde and Notary Public, who sign, certify and assure, that the preceding mark and signature are those which the Notary, Jesus Vejar, is accustomed to use in all the acts which pass before him. We thus prove it, in Tepic, on the fifteenth day of March, one thousand eight hundred and fifty.

"EUSEBIO FERNANDEZ"

"CONSULATE OF THE UNITED STATES.

"I, George W. P. Bissell, Consul of the United States of North America for this district, hereby certify that the signatures attached to the foregoing document are in the true handwriting of the subscribers, who legally hold the situations therein represented, and are worthy of all faith and credit.

"In testimony whereof, I hereunto set my hand and seal of office [L. S.] this 1st day of December, in the year 1850, in the city of Tepic.

"G. W. P. BISSELL,
United States Consul.

"Filed in office September 20, 1850.

"GEORGE FISHER."

It was a copy of this espediente and of the certificates appended to it that was filed with claimants' petition. The papers as made out by James Alexander Forbes was not produced by them until August 18th, 1856, after the appeal to the District Court, when it was brought in upon a formal notice from the United States and an order of the Court. Upon its being compared with the espediente, afterwards alleged by the claimants

to be the original record, it was found not to correspond with it, but differed in many and very essential respects.

On the 6th of November, 1856, the claimants introduced another espediente, certified as a copy from the record, by Pedro Chaboya. The certificate is dated 13th of August, 1846. Chaboya was second Alcalde that year. Juan Fernandez recognized it as being in the handwriting of Salvio Pacheco, who being sworn, testified that he had written it, certificate and all, except Chaboya's signature, but gave no account of any original from which he had copied it. He added his *belief* that the signature was the handwriting of Chaboya. Chaboya himself was not interrogated on the subject. This document also differed from that previously produced.

In was on the 30th of January, 1858, that the claimants put into the case the espediente which they asserted was the original record made up by the Alcalde at the time when the proceeding was closed by the delivery of possession to Castillero. It was brought into Court from the recorder's office of Santa Clara county, by Mr. Houghton, the deputy recorder. On the back of it was the official mark—"Filed 25 February, 1858, at 12 o'clock A. M. J. M. Murphy, recorder, by S. O. Houghton, deputy." It appeared also, that there was on the paper a note in pencil, by Mr. Richardson, to the effect that it was filed 21st of January, 1851. Richardson was then recorder. He was not a witness, but Houghton made a deposition in which he gave the following account of the filing by him:

"The first recollection I have of the document is a few days before the date of this filing on the back of it, which is 'Filed February 25th, A. D. 1853, at 12 o'clock, A. M., J. M. Murphy, Recorder, By S. O. Houghton, Deputy.'

"I think it was sometime in the month of February, I think so from the time this filing is dated. Mr. James A. Forbes came to the office and desired to see the record of this paper, describing the paper to me. I examined the record and told him that it was not recorded there. He then looked for it himself and insisted that it was recorded there; he did not find it. He was looking for the record of the paper, not for the paper itself. Some days after that I

found the paper in the office. There was a safe in the office, in the top of which were some papers; there was also a desk with pigeon-holes containing papers, I found it in one or the other of them. I do not recollect which.

"*Q.* When you found the paper, how did you recognize it?

"*A.* By the description given of it by Mr. Forbes.

"*Q.* If you had ever seen such a paper before in the office, would you not have remembered it?

"*A.* I think that I should.

"*Q.* Were you not surprised when you saw the paper?

"*A.* I was surprised that such a paper should be there without its being known.

"*Q.* Did Mr. James A. Forbes appear to be making a thorough search, and about how long was he in searching for the record of that paper of which you have before spoken?

"*A.* I think he and I together searched more than one day, he represented the paper to me to be of great importance, and I made a very thorough search for the record of it.

"*Q.* Did you always keep your safe locked during business hours, and did you always keep a strict guard upon those pigeon-holes, or was it possible to insert a paper into the top of that safe, or into those pigeon-holes, without your observing when it was done?

"*A.* The safe and the pigeon-holes were generally open during business hours when I was in the office; the books of record were kept in the safe, and the safe was kept open for the purpose of getting access to the books when persons came to examine them. There was no particular guard kept upon anything in the office. I never suffered any person there unless I was there. It is possible that anything might be inserted into the top of that safe or those pigeon-holes without my knowing it.

"*Q.* After you found the paper, what did you do with it?

"*A.* I kept it there until Mr. Forbes came, and filed it at his request."

Captain Halleck, superintendent-general of the mine, and principal agent of the company, testified that he found the document in the office of the Mayor of San José, in January, 1851,; that he took it thence and carried it to the Recorder's

office, where he left it; Mr. Belden, the Mayor, being with him when he found it, and when it was delivered to the Recorder. He confidently believed this to be same paper which he had so found at that time. The following is part of his cross-examination:

"*Q.* In September, October, November, and December of the year 1850, where were the papers of denouncement and juridical possession of the mine of New Almaden, being the same paper produced by Mr. Houghton?

"*A.* I do not know.

"*Q.* Were they not, to the best of your knowledge and belief, in Mexico?

"*A.* I have no knowledge of their being in Mexico, or of where they were. My belief is that they were in San José.

"*Q.* Have you a pretty good memory?

"*A.* I have a pretty good memory of occurrences and of persons, but not a very good memory for names or dates.

"*Q.* During the time of which I have just inquired, did you not verily believe that they were in Mexico?

"*A.* I did not. I had no reason to believe that they were in Mexico, and my reasons for believing they were in San José are that I found them there in 1851, as I have stated.

"*Q.* It is now seven years since the period of which I have questioned you. The human memory is treacherous. I therefore desire you to reflect well upon the answer you have just given. Do you answer in the same manner?

"*A.* I have no change to make in my answer, except to say, as I have before said, that I cannot say positively that the paper produced by Mr. Houghton is the same found in Mr. Belden's office I believe it to be the same, as I have before stated.

"*Q.* You regard the paper which you found in the office of Belden as *the original denouncement and juridical possession of the mine of New Almaden*, do you not?

"*A.* I do.

"*Q* In *reference to that paper*, you then repeat the answer you have given above, do you?

"*A.* I do.

"*Q.* Did you not, in the month of December, 1850, declare on

oath, in a court of justice, that the original denouncement and juridical possession of the mine was at that time in Mexico?

"*A. I may have done so.* I had copies or a copy of that original denouncement and possession, and may have supposed then that the original, which is usually delivered to the parties, was in Mexico. I understood, and always have understood, it to be the practice of Mexican Alcaldes to make two originals of their judicial acts, one of which is made of record in their office, and the other delivered to the parties interested. *I probably then supposed, as I have since, that a duplicate original had been given to Castillero and taken to Mexico.* I remember to have written to Mexico to have such original sent to California to be used in the litigation then pending."

The United States then produced the record of an ejectment brought by Maria Bernal de Berreyesa, widow of José Reyes Berreyesa, against James Alexander Forbes and Robert Walkinshaw, for the land on which the mine is situate. This record showed that on the 18th of September, 1850, the counsel of the plaintiffs moved for an order of the Court on the defendants to produce in Court and file the papers upon which they claimed the mine, "and all papers connected with the said New Almaden Mine, or the land upon which the same is situated, upon which the defendants intend to found their claim to said land or said mine." This motion "was granted by the Court, and the said papers *or copies thereof* were ordered to be produced according to said motion." Mr. Halleck was of counsel with the New Almaden Company, and as one of the attorneys for the defendants, in that action brought by Berreyesa, he put in an answer verified by his own affidavit, to show why the order of the Court could not be complied with. The answer and affidavit were as follows:

"*State of California, County of Santa Clara:*

JAMES A. FORBES, ROBERT WALKINSHAW,
ads.
MARIA BERNAL DE BERREYESA *et als.*

"The defendants in this cause in answer to the order of Court made on the 13th day of September A. D. 1850, requiring the defen

dants to produce in Court certain papers upon which they intended to rely as a defence in this cause, answer and say:

"That they have exercised all due diligence to procure and produce the said papers in Court, by writing immediately on the receipt of the above mentioned order, to the parties in Mexico, who hold them, but to this date the defendants have not received them, this delay having been caused, as defendants verily believe, by the failure of the mail steamers running from Panama to San Francisco, to touch, as heretofore has been their custom, at the port of San Blais in Mexico, from which place the defendants have expected, and still expect, to receive said papers.

"The defendants therefore ask your honorable Court such further time as may be necessary to procure said papers and comply with the said order of Court.

"And the defendants further aver that the said papers and other documents which they have sent for in Mexico, and which they are daily expecting to receive, are absolutely necessary to them in the above entitled cause and that they cannot proceed with the trial of this cause without said papers and documents.

"And the defendants specify, among others, the following papers and documents as absolutely necessary to them before they can proceed with the trial of this cause, viz.: (1) *The original Denouncement of the Mine of New Almaden and the Judicial possession given of the same in the year* 1845. (2.) The confirmation of said Denouncement and possession by the Supreme Government of Mexico in the year 1846, and prior to the late Declaration of War by the United States against the Republic of Mexico. (3.) The original grant of land including said mining possession, made by the Supreme Government of Mexico (prior to the Declaration of War as aforesaid) to the owners of said mine. (4.) The original documents showing the ownership of said mine and land in the parties from whom the defendants derive title: the defendants verily believing that the land referred to in said documents is the same land as that upon which the pretended trespass is alleged in plaintiff's complaint to have been committed, and that these documents are absolutely necessary for their defence.

"The defendants therefore pray a continuance of the above entitled cause to the April Term of this Honorable Court.

"State of California, County of Santa Clara.

"Henry W. Halleck, one of the attorneys in the above entitled

suit, states on oath that he believes the facts mentioned in the foregoing answer and petition are true, that all due diligence has been exercised to produce in Court the aforementioned papers, that further time is necessary to defendants in order to enable them to produce said papers, and that defendants cannot go to trial in this cause till said papers are procured.

"H. W. HALLECK.

"Sworn to and subscribed before me.

"JOHN H. WATSON,
Judge.

"Filed December 23, 1850.

"H. C. MELONE,
Clerk."

The New Almaden Company had several judicial controversies concerning their title to the mine. No record evidence of their title was produced in any of them, nor does it appear that any body having the custody of the Alcalde's archives ever discovered among them any papers relating to Castillero's title. H. C. Melone, who was secretary of the Alcalde's Court before the establishment of the State government, and was clerk of the County Court afterwards, testified as follows:

"*Q.* During the pendency of the suit of Walkinshaw against Forbes, and of the proceedings of Horace Hawes in denouncement, was there offered in evidence or exhibited to you, any document purporting to be a record of the original denouncement of the New Almaden mine, and of possession of said mine, given by any Alcalde in the year 1845.

"*A.* There was none that I know of. I should have remembered it if I had seen it.

"*Q.* Look at the paper now shown you, which is the same which was yesterday in your presence produced by G. M. Yoëll, Deputy Recorder of the County of Santa Clara, then under examination, and which the said Yoëll testified was a paper now on file among the records in the office, of the Recorder of said County, which paper is endorsed, "Posesion de la mina de Sta. Clara, Año de 1845," and say whether this paper was offered in evidence in either the aforesaid suit of Walkinshaw against Forbes, or the denouncement by Horace Hawes of which you have spoken, or was exhibited

to you or seen by you at any time during the said proceedings, or either of them.

"*A.* I think not. I do not remember to have ever seen this paper until a short time since. It was shown me in the Recorder's office of Santa Clara County.

"*Q.* What opportunities have you ever had for making yourself familiar with the records and papers, books and documents, contained in the office of the First Alcalde of the Pueblo of San José, and of obtaining a clear knowledge of what papers were there recorded, filed or kept.

"*A.* I was clerk for Judge May, both as Alcalde and Judge of the First Instance, and had the custody of all the books and papers in the office, and did the recording. After the resignation of Judge May, which took place some time in November, 1849, and the appointment of J. C. Conroy as First Alcalde and Judge Richardson as Judge of the First Instance, I continued to do most of the recording, and had access to the papers and books, and had the custody, in a manner, of said papers and books, until some time in April, 1850, when the State Government went into operation. At that time I took all the records, of every description, and the books and papers belonging to all the suits in the Court of the First Instance, and carried them to my office as County Clerk, and delivered such of those as I thought properly belonged to the County Recorder's office, to John T. Richardson, the then County Recorder.

"*Q.* During all this time of which you have just spoken, and all your connection with the records of which you have just spoken, did you ever see among them, or in any of the offices of which you have spoken, or anywhere else, the paper described in the 38th question as 'Posesion de la mina,' &c. ?

"*A.* I do not recollect of ever having seen it until a short time ago in the Recorder's office."

Pedro Chaboya was *second* Alcalde for the year 1846, and there is an inventory in the office of the papers handed over to him by the *first* Alcalde. This inventory is dated 2d of January, 1846, and contains among other things, this: *Acta de posecion de Mina de Santa Clara a Don Andres Castillero.* There is also another inventory dated November 10, 1846, when Burton, the first person

who was appointed Alcalde of San José, under American authority, received the archives from his Mexican predecessor. In this no mention whatever is made of the act of possession or of any other paper comprised in the claimants' espediente.

Antonio Maria Pico, the Alcalde, whose name is to the act of possession, and Antonio Sufiol and José Noriega, by whom it was signed as assisting witnesses, testify to the making of that paper, but neither of them refer to the petitions of Castillero. The evidence gives no account of them earlier than the time of their discovery by Captain Halleck, in January, 1851.

The Alcalde and his two assistants swore that the Act of Possession was written out by a man named Gutierrez, a schoolmaster in the neighborhood, who brought it to them to be signed at the house of Sufiol. After the signatures were affixed to it, Guttierez took it away. Juan Fernandez was the Alcalde's secretary at the time, and he says that it was brought by Guttierez to him, and that Gutierrez paid him three dollars and a half for writing it, although not having written it, he was entitled to nothing. The secretary does not seem to have done any official act to make the paper a record, and on the subject of the identity of the paper brought him by Gutierrez with the document produced in the cause, the following passage occurs in his deposition:

"*Q.* How do you know that the document you have testified about, is the same document that Gutierrez brought you?

"*A.* Because I know it.

"*Q.* Was the document which Gutierrez brought you all signed?

"*A.* I did not examine it well.

"*Q.* Did you not read it?

"*A.* I did not.

"*Q.* How can you know it to be the same document if you did not read it?

"*A.* I do not know. I have seen it tumbling about with other papers in the Court; I always saw it in the desk tumbling about.

"*Q.* Did you read it when you saw it tumbled about amongst the other papers?

"*A.* The superscription was what I always read.

"*Q.* What was the superscription which you always read?

"*A.* Possession of the mine of Santa Clara, I think it says. I did not pay much attention to it.

"*Q.* Did you read no more than the superscription?

"*A.* If I read any more, I do not remember it.

"*Q.* Then how do you know that this document, of which you have testified, is the same?

"*A.* I imagine it is the same.

"*Q.* Who wrote the superscription; did you write it?

"*A.* I do not know who wrote it, I did not."

Pico Suñol and Noriega testify that on some day, not long after the time when possession of the mine was delivered, they signed the Act of Possession at the house of José Sunol, who lived in San José. Their testimony, as to time, was not from recollection of it, but they spoke with confidence and directness to the fact that the paper was made at or near its date, and within a few days of the time when the act was done which it was intended to record. The document, alleged to be the original, had a *blank* in it for the day of the month—"December ——, 1845." It was the copy made by Forbes, and certified by Weekes, that supplied the day, and referred it to the 30th.

The "writing of partnership" was not in the espediente found by Captain Halleck, but was attached to the one made by Forbes in 1848. In the former espediente there was a paper which was wanting in the latter, namely, the following petition of José Castro:

Señor Alcalde of 1*st Nomination of the Pueblo of San José de Guadalupe:*

Pueblo de S. Jose C. June 27. 1846. Let this be included and archived as the party requests. PACHECO.

I, José Castro, Lieutenant-Colonel of Cavalry in the Mexican Army, a native of this Department, before your notorious justification (notoria justificacion) appear and say: That representing at present the person and rights of Captain D. Andres Castillero, and other individuals who compose the company (I being one of the shareholders) in the quicksilver mine which the said Señor Castillero denounced on the third day of December one thousand eight hundred and forty-five, and of which possession was given us on the

thirtieth of the same month and year, in strict conformance with the laws of mining, title sixth, article first, which grants to discoverers of new mines, three *pertenencias* contiguous or disconnected, of the dimensions designated by law, and as accords with its rights, the company claims now, as a matter of course (dá hóy pordeducidas) before you, the three *pertenencias* in continuation of the first, it being proper that this petition should be attached to the *expediente* of the denouncement, so that it may remain among the archives and appear through all time.

Not going on paper with proper seal, because there is none; I pray that I may receive favor and justice.

José Castro."

Santa Clara, June 27, 1846.

José Castro testified very positively that this petition was made at the time of its date, signed by him, and sent to the Alcalde.

The petition was in the handwriting of Benito Diaz, and he declared on his oath, as a witness, that it was written some months after its date, and after the American conquest of the country; but the reputation of Diaz for truth and veracity was such as to make him unworthy of credit in the opinion of the Court below, and that opinion, based upon the personal knowledge of the judges, was placed on record.

On the 17th day of July, 1860, the fourth espediente was brought into the case, accompanied by clear proof from the claimants' witnesses, that it had been found among the papers of Robert Walkinshaw, deceased, who in his lifetime had been a member of the New Almaden Company, and for a while one of its principal agents. This espediente had the following caption and summary of contents.

Year 1845.

"*Expediente of the denouncement, possession, and partnership of the Quicksilver Mine, called Santa Clara, Jurisdiction of San José Guadalupe, in Upper California.*

"November 22d, 1845.—Don Andres Castillero makes the denouncement of the aforesaid, in the Pueblo of San José Guadalupe, for want of Deputation of Mining and of Judge *de letras.*

"December 8d, 1845.—Writing which the said Castillero presented, testifying to having taken out quicksilver and other metals, asking that it be annexed to the espediente.

"December 30th, 1845.—An act of possession, which with the assisting witnesses the Alcalde of the Pueblo of San José gave to Don Andres Castillero, of the mine of Santa Clara, because of the time of the notices being completed.

"December 30th, 1845.—Receipt for the fees of the possession, signed by the Judge of San José.

"December 8th, 1845.—Writing of partnership for the works of the mine, authorized by the Prefect of the 2d District."

The writing of partnership, mentioned in the summary, was not connected with the espediente when produced to the Court. It was composed of the other papers there described. Following each of the two petitions was a certificate with the name to it of Pedro Chabollo, declaring that the respective papers were copies from the original, and the certificates are countersigned by José Sufiol and Pedro Sainsevain, as assisting witnesses. All the papers comprised in this espediente and the certificates thereto, (every thing except the signatures,) are in the handwriting of Gutierres. Chabollo gave the following account of the manner in which his name was signed:

"*Q.* What day, month, and year was it that you signed the two documents in "Exhibit J. Y. No. 1, W. H. C.," purporting to be copies of two representations by Andres Castillero to the Alcalde of the Pueblo of San José, dated respectively the 22d November and 3d December, 1845?

"*A.* I don't remember the day, but it must appear on the papers. I think it was on the 13th February, 1846.

"*Q.* What is it that fixes that date in your mind?

"*A.* Because I have been shown the papers here.

"*Q* What else makes you remember that date?

"*A.* Nothing else; if I had not seen them perhaps I should not have remembered them, it was so long ago

"*Q.* Who showed you the papers?

"*A.* I was shown them the other day on my examination I was not shown them before

"*Q.* Are you not mistaken; were they not shown to you in Mr. Barron's office by somebody?

"*A.* No, sir; I was shown them here; also the signatures of Sainsevain, Noriega, Suñol, and my own.

"*Q.* Who asked you to sign your name on that paper?

"*A.* A person name Gutierrez, or a name very like that.

"*Q.* What had Gutierrez to do with it; what is the reason he asked you?"

"*A.* They were papers relating to the mine. I was in authority at that time. I was asked to sign them, and I signed. I don't know what Gutierrez had to do with them. I only remember that he brought them and I signed with the other witnesses

"*Q.* Where did he get them from?

"*A.* I don't know, but he probably got them from the mine.

"*Q.* Who had them at the mine, perhaps?

"*A.* I can't say.

"*Q.* How did you know the papers were correct when you signed them?

"*A.* I supposed they were correct, as they were brought by those people. I did not examine them at all; it was not for me to do that.

"*Q.* What do the papers purport to be, in your opinion, and according to your present recollection?

"*A.* They are papers.

"*Q.* Look at these papers and read them; say what they are?

"*A.* I can't read writing well; I can only read it with great difficulty.

"*Q.* Don't you know how to write?

"*A.* It is with difficulty I can paint my signature. I never learned to write.

"*Q.* When did you learn to paint out your signature; who taught you?

"*A.* I learned alone, I had no teaching. I had a liking for writing and learned by own efforts alone.

"*Q.* What compensation have you received, or are you to receive, for giving your testimony in this case?

"*A.* I don't know what I am to receive; I have only received my expenses. I have never been offered any payment for my testimony.

"*Q.* As you were only second Alcalde, what had you to do with the keeping of the documents, or the certifying to copies?

"*A.* It was my duty as Judge to keep the records. The first Alcalde was sick, and I acted for him. Dolores Pacheco was first Alcalde.

"*Q.* How do you happen to remember now that he was sick at that time? It was a very long time ago.

"*A.* Because we were named Judges together, and I remember that when he took sick I had to notify the Prefect, who required that I should act during his sickness.

"*Q.* Who was the Prefect?

"*A.* Manuel Castro. I got an order from him to act as first Alcalde during the sickness of the incumbent, otherwise I should not have done so."

José Suñol, one of the assisting witnesses, was dead. Pedro Sainsevain, the surviving one, deposed that his name was placed to the documents by himself, at the time of the date. but he did not say whether the certificate was true or false, and appears to have signed it without thinking it his duty to inquire for the original. Two witnesses, Messrs. Sloan and Marks, testified to declarations of Sainsevain that the certificates were made in 1848, and not in 1846.

There was no certificate to the Act of Possession, as found in this expediente. The claimants alleged it to be a duplicate original, and to prove it such called Pico, Noriego and Suñol, whose testimony accorded with the allegation. Neither of these witnesses had spoken in their former depositions of more than one original being made.

This Act of Possession, was dated 30th of December, 1845, there being no blank as in the other original.

All these expedientes were alike in some points, but no two of them corresponded in all respects. Some of the points of difference were important and remarkable. But they are sufficiently set out in the opinion of Mr. Justice Clifford.

A considerable portion of this voluminous record is occupied by evidence of the statements and declarations of Castillero himself. Besides his own declarations made to Colonel Fremont,

letters written by him to General Vallejo and Governor Pio Pico; letters of Pico addressed to persons in Mexico; a letter from Manuel Castro to Pico; dispatches from Mr. Larkin, United States Consul at Monterey, to Mr. Buchanan, then Secretary of State; articles from Mexican newspapers; letters from Mr. Larkin to Mr. Judd, Prime Minister of the King of Hawaii, and a newspaper entitled the "*Polynesian*," printed in the Sandwich Islands—were given in evidence by the claimants, furnishing the ground of much remark in the Court below, and some little here; but inasmuch as they do not appear to have been noticed by this Court, it is not considered necessary to insert them in the report.

There was much parol testimony concerning the condition of the mine, the alleged discovery of it by Castillero, the work done at it, the possession given to him by the Alcalde, and the subsequent occupation of it by him and his alienees.

It is situate about fifty-five miles southeast from San Francisco, in a valley called "La Canada de los Capitancillos." This valley is bounded by the Sierra Azul on the south, and the Puebla hills on the north. It is watered by several streams, which rise in the mountains and find their outlet at the northwestern end of the valley, running thence towards the Pacific. On the north side the land is nearly level or slightly inclining to the southwest, but nearer to the mountain, on the south side there runs, on a parallel with the mountain, a range of hills, called *lomas bajos*—low hills. These hills were regarded by some of the witnesses as part of the Sierra, and by others they were considered as being entirely distinct. It is in them that the quicksilver was found, and from an old opening in a peak, near the eastern end of the range, came the ore which Castillero used in his experiments.

For many years—probably long before the advent of the Spaniards into that country—the Indians knew that the cinnabar, of which the *lomas bajos* were in a measure composed, was neither common earth nor common rock, for it was ruby red, and nearly two and a half times as heavy as sand stone In fact it was a *bi-sulphide of mercury*, some of it almost as pure

as the vermilion of the shops. The Indians used it to paint their faces and bodies. Afterwards a quantity was dug out and carried to Santa Clara to paint the Mission Church. In 1824 and 1835, attempts were made to work it as a silver mine Late in the autumn of 1845, Castillero came to California on business, which took him to Sutter's fort. He left that place on the 12th of November, and went to Santa Clara. Some of the ore being shown to him, he pronounced it *silver* with a *ley of gold.* The last of November, or first of December, at Santa Clara, he detected the presence of quicksilver in it, as shown by the following testimony of Jacob P. Leese.

"About the latter part of November, or first of December, 1845, I went into the mission of Santa Clara to dine with Padre Real of the mission; Mr. Castillero was there. Our general conversation through dinner was about this mine, and of experiments which Castillero had been trying, to find out what the mineral was. He made a remark, and said he thought he knew what it was; if it was was what he supposed it was, he had made his fortune. We were anxious to know what it was. He got up from the table and ordered the servant to pulverize a portion of this ore; after it was pulverized he ordered the servant to bring in a hollow tile full of lighted coals; he took some of the powdered ore and threw it on the coals; after it got perfectly hot he took a tumbler of water and sprinkled it on the coals with his fingers; he then emptied the tumbler and put it over the coals upside down; then took the tumbler off and went to the light to look at it; then made the remark that it was what he supposed it was, "quicksilver." He showed all who were there the tumbler, and we found that it was frosted with minute globules of the metal, which Castillero collected with his finger and said it was quicksilver. He then said: to-morrow he would test it thoroughly and find out what it was worth, he considered it very rich on account of the weight of the ore, and if it proved as rich as the quicksilver mines in Spain, that the Mexican Government had offered to any one for the discovery of such a mine in the Republic of Mexico, one hundred thousand dollars."

In one of the espedientes, the first representation of Castillero is dated at Santa Clara, in the other at San José. There was no

extrinsic evidence to show at which of these places it was written, or when it was written, or that it was delivered to the Alcalde by Castillero, or sent to him, or that Castillero was seen to sign it, or known to have it in his hands. It is in the handwriting of Juan Castenada, whose deposition was not taken. The testimony is equally silent on the subject of the supplementary petition, which, however, is dated in all the copies at Santa Clara, and is also in the handwriting of Castenada. Several witnesses declared their belief that the name of Castillero, as signed to both petitions, was in his handwriting. It was admitted in this Court, that the writing of partnership, dated 2d of November, 1845, must have been misdated, and could not have been made until after the experiment testified to by Leese, which was the last of November or first of December.

Upon these papers, and the accompanying parol evidence, the claimants contended that Castillero was the discoverer of the mine, since they show that he was the first to find metal in it. The United States, on the other hand, maintained that the discovery of a mine consisted in ascertaining its situation, the extent and direction of the vein, the true character of its product, and whatever else might be necessary to give a correct idea of its value; that Castillero had learned none of these things; that when he made his original petition, he was utterly ignorant even of the metal, believing the cinnabar to be silver with an alloy of gold; that when he put in his supplemental petition he mistook it for such a combination as nature never made—gold, silver, and liquid quicksilver—and this blunder he persisted in to the last; that the mine was never actually discovered, or its real contents known, as a discoverer should know them, until Alexander Forbes explored it in January, 1848

After the date of Castillero's second petition, he employed a man named Chard to reduce some of the ore. He took a gun-barrel, charged it with pieces of ore the size of a bean, stopped the touch-hole with clay, put the muzzle in a vessel of water and built a fire around the other end. The heat drove off the mercury in the form of vapor, which passing out at the muzzle, was condensed in the water, and precipitated itself to the bottom

in the form of liquid metal. Several gun-barrels,—as many as three or four,—were used in this way at once, and the work was kept up for a month or six weeks.

While this was going on, the Alcalde, Pico, Suñol, Noriega, Fernandez, Gutierrez, Padre Real, and some other persons, came to the mine where Chard was at work with his gun-barrels, and the thing was done which the claimants assert was the delivery of juridical possession, Pico was examined three times in this case, and once in the adverse case of Berreyesa, and his several depositions, relating to the delivery of possession, are not without serious contradictions; some of which are adverted to in the opinion of the Court. All the witnesses concur in saying that there was no survey or marking of the pertenencias, nor was there any professor present, or other person skilled in mining, or competent to inspect it and declare its character. Chard could not recollect that Castillero was present; the other witnesses testified that he was there.

Some time after this transaction Chard built a furnace near the creek, and packed down the ore to be reduced there; but some defect in the construction of the furnace made it a total failure. Some old try pots were then procured, and by turning them bottom upwards over a heap of ore, providing a mode of conducting the vapor to the water, and setting fire to three or four cords of wood over each one, he obtained a quantity of quicksilver, which was not weighed, but it could not have been less altogether than two thousand pounds. This continued until August, when Chard, and the Indians who were helping him, suddenly quit work and left the place. Nothing whatever was done at or about the mine until April or May of the next year, when Walkinshaw and Alden came there. Alden testifies that he took charge of it as agent for the claimants, but he does not mention what specific thing was done by him. In November, Alexander Forbes, of the firm of Barron, Forbes & Co., came up from Tepic with workmen, money, and other appliances for business. The mine was thoroughly examined, and in January, 1848, the operations which have yielded so large a result were fairly commenced.

Castillero left California in March, and arrived in the city of Mexico in May, where he memorialized the Junta de Mineria, or Board for the Encouragement of Mining, as will be seen by the documents hereafter to be mentioned. He never returned to California. In the winter of 1846–7, he sold certain shares of the mine to Barron, Forbes & Co., of Tepic, as well as to other persons, and contracted for the habilitation of it. The bargaining on the part of Barron, Forbes & Co. was done by Mr. Negrete, to whom Castillero showed the writing of partnership as his mining title, and that paper alone was recited in all the acts of sale made by him and his alienees and socios down to the year 1852.

Immediately after Castillero's arrival at the City of Mexico, he commenced the proceedings which were given in evidence by the claimants as proof that the mining title was confirmed by the Supreme Government, and that a grant at the same time had been made to him of two square leagues as a colonist. The six following papers constituted that part of the title.

"Stamp third—Four reales.—For the years eighteen hundred and forty-six and eighteen hundred and forty-seven.

"I, Andres Castillero, resident and miner in the Department of Upper California, before your Excellency and your Honor, as I best may proceed, say: That, having discovered in the mission of Santa Clara a mine of quicksilver, of *leyes* as rich, certainly, as were ever seen before, not only in the Republic, but perhaps in all the world, as proved by the assays made by the order of the Junta Facultativa of the College of Mining, which, mixing together of all the specimens I brought, from the best to the worst, have given a result of thirty-five and a half per cent., while there have been specimens of the best kind which must produce much greater *leyes*, I see myself in a condition to satisfy my desires in favor of the progress of my country, of benefiting exclusively Mexicans by the flattering and well-founded hopes which such a discovery offers. In virtue of this *I have denounced and taken possession not only of said mine named Santa Clara, but also of an extent of three thousand varas in all directions from said point. I have formed a company to work it.* I have constructed the pit, and complied *with all the conditions pre-*

scribed by the ordinance, the mine yielding ore, with the notable circumstance that the specimens which I brought and which have been assayed have been taken out of the mouth. It would have been very easy for me to have given the necessary extension to the negotiation by accepting the repeated and advantageous offers which have been made to me by several foreign houses in California; but the undertaking does not require that kind of assistance, which would result in advantage to foreigners, when it may be entirely national, and I have not, for that reason, hesitated to apply to your Excellency and your Honors to obtain the small and only resources which I need. These are reduced to a small advance of five thousand dollars in money, in consideration of the excessive scarcity of coin in that Department, and the quick remittance to it of retorts, cylinders, and other small distilling apparatus, and also iron flasks for bottling up the quicksilver.

"I would have proposed a contract of partnership to the Junta, an *avio*, or some other agreement, if there had been time to be able to furnish the proofs and details which would be required for said contracts; but being compromised by the Supreme Government to leave this Capital within a few days, I find it necessary to restrict myself to that which appears to present no difficulty, and which may open a way to our future agreement.

"I am well persuaded that the Junta will accede to my request, so far as may be within its power, and that it will send up to the Supreme Government with a recommendation that which may require the decision of the latter.

"My propositions, then, are the following:

"*First.*—The Junta, in the act of approving the agreement, will give me a draft for five thousand dollars on some mercantile house in Mazatlan.

"*Second.*—On my part, I bind myself to place in said port, within six months after leaving it, fifty quintals of quicksilver, at the rate of one hundred dollars each, which I will send from the first taken out, with absolute preference over every other engagement.

"*Third.*—The Junta will order that there be placed at my disposition before leaving the Capital, the eight iron retorts which it has in its office, and all the quicksilver flasks which can be found in the *negociacion* of Tasco, which are fit for use; and lastly, it will deliver

to Señor Don Tomas Ramon del Moral, my attorney, the sums to pay for the retorts, cylinders, and other kinds of small apparatus, which may be ordered to be made for the *negociacion*, to the amount of one thousand dollars.

"*Fourth.*—I will receive the retorts of the Junta at cost price, and the flasks which I may select at two dollars a piece, agreeably with their valuation.

"*Fifth.*—The ascertained value of said retorts and flasks, and that of the sums which may be delivered to Señor Moral, I will return in the term of one year from this agreement, and also the premium on the draft on Mazatlan, in quicksilver, placed in said port at the price of one hundred dollars the quintal; but if the Junta should wish to take one or more "acciones" in the mine, it shall be left as a part payment of the sum corresponding to one or more barras.

"*Sixth.*—While the company is being formed, during the period of one year, counted from the date on which this agreement shall be approved, and the five thousand dollars spoken of in the first proposition being paid, I will give the preference to the Junta in the sale of quicksilver placed in Mazatlan, at the rate of one hundred dollars the quintal.

"*Seventh.*—The Junta shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine by the local authorities of California, in the same terms as those in which I now hold it.

"*Eighth.*—It shall also represent the advantage of their being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my business.

"*Ninth.*—For the compliance of this contract I pledge the mine itself and all its appurtenances.

"The subscriber subjects this request to the deliberation of the Junta, which, if accepted, may be made into a formal contract, and made legal in the most proper manner.

"God and Liberty. Mexico, May 12th, 1846.

"ANDRÉS CASTILLERO

"Copy. "Mexico, April 23d, 1850.

"O. MONASTERIO."

"*Junta for the Encouragement and Administration of Mining.*

No. 372.
"Communicates the discovery of a deposit of cinnabar, made in the Presidio of Santa Clara, in Lower California, the assays of which have yielded the highest ley known, and with this motive communicates the result of the quantity of quicksilver extracted until the end of March, in Guadalcazar.

"May 9th, 1846.
"Noted with satisfaction the discovery and of having asked already of Señor Castillero the kind of resources he requires.
"Noted also, the statement given of the quicksilver extracted by the miners of Guadalcazar."

MOST EXCELLENT SIR:—Professor Don Tomas Ramon del Moral having presented to this Junta some specimens of cinnabar from the Mission of Santa Clara, in Lower California, which Don Andres Castillero sent him, together with the annexed copies, with the object of inciting the Supreme Government, that it may be pleased to aid so important an enterprise, said specimens were immediately sent to his Excellency, the Director of the College, that the proper assays might be made. His Excellency, in an official communication of the twenty-ninth of last month, received yesterday, says that which follows: Señor Don Tomas del Moral, President of the Junta Facultativa of the National College of Mining, in an official communication of the twenty-fourth ult., says to me as follows: 'Most Excellent Sir:—The Junta Facultativa having examined the documents which your Excellency referred to on the twenty-first of the present month, relative to a deposit of cinnabar discovered in California by Señor Don Andres Castillero, and another of coal on the Bay of San Francisco, has the honor to inform your Excellency that the specimens sent by said Señor Castillero were deposited, some in the Mineralogical Cabinet, and others assayed by the Professor of Chemistry, Don Manuel Herrera. The assay gave a *ley* of thirty-five and a half per cent., a mean of the different specimens having been taken to make the assay, for there are some so rich that they are pure cinnabar. The Junta believes that Señor Castillero has, by such an important discovery, made himself deserving of the efficacious protection of the Supreme Government and of the Junta for the Encouragement of Mining, and is persuaded that your Excellency will interpose all your influence to the end that this individual may receive a proof that the Supreme Government knows how to distinguish and reward those citizens who contribute to the prosperity of the country.'

"'And with this motive, I repeat to your Excellency the considerations of my esteem and respect. And I have the honor to transmit it to your Excellencies, as the result of your dispatch on the matter.'

"The Junta, on inclosing the foregoing communication to your Excellency, has the honor to inform you that it has already asked Señor Castillero what kind of aid or protection he needs for the encouragement of his brilliant enterprise, congratulating the Supreme Government on a discovery, which, if it meets, from the beginning, with all the protection it deserves, may change completely the aspect of our mining, freeing it from the necessity in which it has been until now, of foreign quicksilver. With this motive, the Junta takes advantage of the opportunity to inform your Excellency that, as on the twenty-fourth of this month, the bounty terminates which the law granted, of five dollars premium on each hundred-weight of quicksilver extracted from the mines of the nation, the miners of Guadalcazar have proved that they have taken out one thousand five hundred and seventy-five quintals, from December, eighteen hundred and forty-four, to the end of March last, which result exceeds the calculation, which, until now, had been made, that the product of this mineral was one hundred quintals per month. The Junta, on this occasion, reiterates to your Excellency the assurances of its distinguished consideration and esteem.

"God and Liberty. Mexico, May 5, 1846.

VINCENTE SEGURA, *President.*"

Junta for the Encouragement and Administration of Mining

No. 573.
"Accompanies with recommendation the petition of Andres Castillero for the encouragement of the quicksilver mine which he has discovered in the mission of Santa Clara in Upper California.

"May 20. 1846.
"Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the minister of relations for the proper measures of his office with the understanding that the supreme government accedes to the petition.
[Rubric.]

"MOST EXCELLENT SIR:—As this junta had the honor to inform your Excellency on the 5th instant, in No. 573, Señor Don Andres Castillero has directed to it a petition, the orignal of which it has the pleasure to transmit herewith, regarding the assistance which he needs for the new discovery of the quicksilver mine in the mission of Santa Clara, in the department of Californias. The junta has no hesitation in recommending said petition to your Excellency; for, being persuaded of the great importance of the enterprise, it considers it entitled to all the protection of the Supreme Government, and also the particular circumstances of that department, and the just desire which his Excellency the President has shown to preserve the integrity of the National territory, render it worthy

of the greatest consideration. The junta is consequently of opinion that there should be immediately furnished to Señor Castillero the sum of five thousand dollars, in the terms he proposes; that it should be authorized to furnish him with the iron retorts and flasks belonging to it, and the other thousand dollars, which can be employed in the construction of retorts, cylinders, and other small apparatus of distillation for said mine; although the law authorizing the Junta to make loans for the encouragement of deposits of quicksilver exacts a premium of five per cent. per annum on the capital loaned, it cannot be doubted that the proposal of Señor Castillero to pay the five thousand dollars with fifty quintals of quicksilver placed in Mazatlan, at the disposition of the junta, at the rate of one hundred dollars each, and in the term of six months, offers greater advantages to the fund than the said interest. The urgency shown by Señor Castillero to undertake his journey to that department, and that which his so doing may contribute under present circumstances towards the preservation of the National territory, is, in the opinion of the Junta, a sufficient motive to leave until a more opportune occasion the formation of a contract of partnership, or of "avio" for the encouragement of said mine. It remains, then, to show to your Excellency that, although the possession given to Señor Castillero by the local authorities of California has not been in conformity with the ordinance, inasmuch as there have been granted him "pertenencias" to the extent of three thousand varas, which are equivalent to fifteen "pertenencias," agreeably to the second article of the eighth title; yet it is necessary to consider that he has in his favor the qualification of being discoverer *of an absolutely new hill, in which there was no mine open*, and to such there is granted in the first article of the sixth title *three "pertenencias," either continuous or interrupted; and if he shall have discovered other veins, one ("pertenencia") in each of them.* He has also in his favor the circumstance that he works it in company with others, to whom there is granted that without prejudice to the right which they may have by the title of discoverers, when they are such, they may denounce four new pertenencias, even though they are contiguous and in the same direction; but that which is most worthy of consideration is that Californias being a frontier department, and frequently threatened by the emigrants from the United States of the north, and by the new colonists of Oregon, it seems proper to grant to the first mine

discovered in a department so extensive a greater number of "pertenencias," which view is corroborated by the reason found at the end of the eighth title, Article 1st, which says: "Considering that the limits established in the mines of these kingdoms, to which those of New Spain have until now been made to conform, and are very contracted in proportion to the multitude, abundance, and richness of the metallic veins which the goodness of the Creator has been pleased to grant to those regions, I order and command that in mines which may hereafter be discovered in a new vein or without neighbors, these measurements be observed. 2d. Along the thread, direction, or course of the vein, be it of gold, silver, or any other metal, I grant to every miner, without distinction of the discoverers, (who have their reward already assigned to them,) two hundred Castilian varas, called 'varas de medir,' measured on a level." Lastly, in the first article, eleventh title, there are expressed these terms: "And because the capital of a single individual may not be sufficient for great undertakings, while that of all the partners may be, I will and command that such companies be encouraged, promoted, and protected by all convenient measures, my viceroy granting to those who may form such, every favor, aid, and exemption which can be granted them according to the judgment and discretion of the royal tribunal of mines, and without detriment to the public and my royal treasury." In reference to the ownership of two square leagues which Señor Castillero solicits, as a colonist, upon the surface of his mining property, for the purpose of supplying himself with the firewood necessary for the reduction of ores, (beneficio,) the Junta not having the necessary information on the matter of which the Supreme Government has abundance, his Excellency the President will decide as he may think proper. In this view the Junta, in sending up to your Excellency the petition of Señor Castillero, has no hesitation in recommending it very efficaciously on account of the vital importance of the undertaking, and its incredible influence upon the general good and prosperity of the Republic.

The Junta has the honor, on this occasion, to repeat to your Excellency the assurances of its distinguished esteem and consideration.

"God and Liberty. Mexico, May 14, 1846.

VINCENTE SEGURA,
President.

"*Ministry of Justice and Public Instruction.*

"MOST EXCELLENT SIR:—Having reported to his Excellency, the President *ad interim* of the Republic, your Excellency's note of the 14th inst., with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the mission of Santa Clara, in Upper California: his Excellency has been pleased to approve, in all its parts, the agreement made with that individual, in order to commence the working of said mine, and on this day the corresponding communication is made to the Minister of Exterior Relations and Government, to issue the proper orders respecting that which is contained in the 8th proposition for the grant of lands in that department.

"I repeat to your Excellency the assurance of my esteem.

"God and Liberty. Mexico, 20th May, 1846.

"BECERRA

"To His Excellency, D. Vicente Segura, President of the Junta for the Encouragement of Mining."

Ministry of Justice and Public Instruction.

"May 23d, 1846.
"Issue the orders referred to in the communication.
"[Rubric of Castillo Lanzas.]"

"I this day say to His Excellency, Don Vicente Segura, President of the Junta for the Encouragement of Mining, what follows:

"MOST EXCELLENT SIR:—Having reported to His Excellency, the President *ad interim*, your Excellency's note of the fourteenth inst., with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero, for the encouragement of the quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California, his Excellency has been pleased to approve, in all its parts, the agreement made with that individual, in order to commence the working of said mine, and on this da) the corresponding communication has been made to the Minister of Exterior Relations and Government, to issue the proper orders respecting that which is contained in the eighth proposition for the grant of lands in that Department.

"And I have the honor to transcribe it to your Excellency, to the end that, with respect to the petition of Señor Castillero, to which his Excellency, the President *ad interim*, has thought proper to accede, that there be granted to him as a colonist two square leagues

upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding.

"I repeat to your Excellency the assurances of my consideration and estcem.

"God and Liberty. Mexico, May 20th, 1846.

"BECERRA.

"To His Excellency, the Minister of
Exterior Relations."

Ministry of Exterior Relations, Government and Police.

"MOST EXCELLENT SIR:—His Excellency the Illustrious Minister of Justice, in an official communication of the 20th instant, says to me that which I copy: 'Excellent Sir:—I to-day say to his Excellency Don Vicent Segura, President of the Junta for the Encouragement of Mining, that which follows:' 'Most Excellent Sir:—Having reported to his Excellency the President *ad interim* the note of your Excellency of the 14th instant, with which you were pleased to transmit, with a recommendation, the petition of Señor Don Andres Castillero for the encouragement of the quicksilver mine which he has discovered in the mission of Santa Clara, in Upper California, his Excellency has been pleased to approve, in all its parts, the agreement made with that person to commence the exploration of that mine, and on this date the corresponding communication is made to the Ministry of Exterior Relations and Government, that it may issue the proper orders relative to what is contained in the eighth proposition, with respect to the granting of lands in that Department.'

"And I have the honor to enclose it to your Excellency to the end that, with respect to the petition of Señor Castillero, to which his Excellency the President *ad interim* has thought proper to accede, that as a colonist there be granted to him two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding.

"I repeat to your Excellency, &c.

"Wherefore I transcribe it to your Excellency in order that, in conformity with what is prescribed by the laws and disposition upon colonization, you may put Señor Castillero in possession of the two square leagues which are mentioned.

"God and liberty. Mexico, May 23, 1846.

"CASTILLO LANZAS.

"His Excellency the Governor of the Department of Californias."

To the dispatch of Castillo Lanzas, the Minister of Relat'ons, when it was filed by the claimants, the following certificate of Jesus Vejar was appended:

"I, Jesus Vejar, a Notary Public, hereby certify and attest that the foregoing authentic instrument, signed by his Excellency, the Minister of Foreign Relations, Government and Police, Castillo Lanzas, has been respected under that signature, and obeyed by the Mexican authorities that governed in Upper California in the year eighteen hundred and forty-six, according to insertions which the said authorities made of the said instrument in acts which they passed upon the subject of which they treat, and which I certify to have seen, and for this reason that signature in the said instrument should be esteemed as authentic and signed in the handwriting of his Excellency, the Minister, and as, also, by proceedings that have passed under my observation, Señor Don Andres Castillero recognized it.

"And at the instance of the Messrs. Barron, Forbes & Co., I have placed hereon my signet, and sign it in Tepic, on this 1st day of March, 1850.

JESUS VEJAR,

"We, the undersigned, First Constitutional Alcalde and Notary Public, hereby certify and attest that the foregoing signet and signature which Don Jesus Vejar, a Notary, generally uses in all the acts is that performed by him.

"This we certify in Tepic, this 1st day of March, 1850.

LORETO CORONA.
EUSEBIO FERNANDEZ."

To authenticate the documents further, the claimants brought to San Francisco, and there examined, Castillo y Lanzas, who in 1846 was Prime Minister of Mexico, and had charge of the Department of Exterior and Interior Relations; Manuel Couto, Secretary of the Fonda de Mineria and Member of the Junta de Fomento; José Maria de Besoco, Member of the Junta; Blas Balcarcel, Member of the Junta, and Director of the Mining College; Antonio del Castillo, Professor of Mineralogy and Secretary of the Junta; José Maria Yrrisarri, Keeper of the Archives in the Ministry of Justice; Mariano Mariano, clerk in the Ministry of Justice, and A. Q. de Velasco, clerk in the Ministry of

Relations. These witnesses testified that the documents produced were genuine; that they knew them to be true copies of such as were registered in the books of the several departments, and that they corresponded perfectly with the borradors existing in other cases. Some of them swore to their personal knowledge of the fact that the documents were issued and the records of them made up at the times when they respectively bore date. By some of them was proved Castillero's exhibition of quicksilver ores to the Junta and the College of Mining; the assays of it, and the results. Their testimony also showed that a report to the Congress was made and printed in the fall of 1846, in which Castillero's discovery of quicksilver in California was referred to at some length.

Francisco Martinez Negrete, a merchant residing at Guadalajara, was called to explain the circumstances attending the sale of *barras* and other transactions of Castillero with Barron, Forbes & Co.

The claimants introduced divers letters, addressed by their counsel, to the President of the United States, the Secretary of State, and the Attorney-General, together with some of the replies by those officers, in which were discussed, *inter alia*, the regularity and propriety of taking depositions in Mexico.

In the year 1857, and while this cause was pending in the District Court, process was issued requiring Mr. Davidson, a banker of San Francisco, to produce a package of letters which had been deposited with him by Henry Laurencel and James Alexander Forbes, subject to their joint order. He did so; the package was opened; the letters were read, and became a part of this case. The handwriting of the several parties, by whom they purport to be written, was proved by several witnesses. The letters were as follow:

"*Tepic, May* 11, 1846.

"MY DEAR SIR:—I wrote to you at great length on the 15th ultimo by the Rev. Mr. Macanamara, who intends visiting California, and who proceeded to Mazaltan in order to procure a passage; but he is still there, and there is every probability that he will go by the vessel which takes this. I need not repeat what I have already said, but it

may not be amiss, in case my letter not reaching you, to state that its object was to request of you to procure as correct information as you could respecting the quicksilver mine, or mines, lately said to be discovered in California, one of which you mention as being worked by Mr. Castillero. If quicksilver mines of value are discovered, it would be of immense interest for Mexico, as owing to the scarcity and high price of this article, the poorer silver mines of Mexico cannot be worked. I therefore beg to request your kind attention to this letter.

"I am, my dear sir, your most obedient servant,

"ALEX. FORBES.

"Addressed: James A. Forbes, Esq.

"British Vice Consul, California,

"Endorsed: Alex. Forbes, May 11, 1846, relative to quicksilver mine. No. 1."

September 2, 1846.

"MY DEAR SIR:—I am much obliged to you for your offer to procure for me more information respecting the quicksilver mines, and I hope they may turn out to be of value. Anything certain which you may give me about them will be very interesting, as our mining establishments in this country must greatly be benefitted by the abundance of quicksilver, and which is now scarce and dear here. I understand Castañedo is still in Mexico. Does not one of these mines belong to him, or has he disposed of it?

"I am, my dear sir, yours very truly,

"ALEX. FORBES.

"J. A. Forbes, Esq.

"I received your power of attorney to James Murray, Esq., and forwarded it by last packet.

"Endorsed: Alex. Forbes, September 2, 1846, relative to quicksilver mine. No. 2.

"(In pencil.)—A. Forbes, private, 1st and 2d Sept., 1846."

"*Tepic, January* 7, 1847.

"JAMES A. FORBES, Esq., California,

"MY DEAR SIR:—I had the pleasure to receive your very obliging letter of the 29th of October last, which chiefly relates to the mine of quicksilver about which I wrote you at so much length by Mr. Macnamara. I had previous to the receipt of your letter been in treaty

with D. Andres Castillero, respecting this mine, and on the arrival of Mr. Macnamara with the powers from the other proprietors, the treaty was much facilitated, and I am now happy to inform you that I have contracted for the 'Habilitation' of the mine, and have also purchased a part of Mr. Castillero's 'Barras,' all of which will be made known to you by Mr. Walkinshaw, who goes to California as my attorney and agent for the examination and working of the mines. Mr. Walkinshaw will wait upon you as soon after his arrival as possible, and will show you all the documents, and ask your advice and assistance in carrying out my views.

"It is needless for me to say more, than that I count on you as a friend who will lend your best assistance to bring this negotiation to a good account, and as you inform me that you are the proprietor of two 'Barras,' it will be for your interest and that of all others concerned, that every means may be used to make the most of it.

"I have sent up a small sum of money to make a beginning, and if Mr. Walkinshaw is of opinion that the business ought to be caried on to a large extent, the necessary apparatus will be ordered, and ample funds sent to carry on the business properly.

"I have for the present only sent one hundred and fourteen iron bottles, but I can get a large quantity in this country when they may be required.

"Mr. Walkinshaw will inform you that everything is left open respecting the interest which he and others may take in this enterprise, and I trust you will also leave to me the regulation of the affair which must depend on after prospects. For the present I wish no one to run any risk or to incur any expense but myself, which, however, you must be aware will be very considerable; but if the mine turns out well, there will be sufficient for all.

"I, in conclusion, beg leave to recommend most strongly my friend Mr. Walkinshaw to your best attentions and assistance, and I am sure you will find him most worthy of your confidence.

"I am, my dear sir, yours, most sincerely,

"ALEX. FORBES.

"James A. Forbes, Esq., California.

"Endorsed: Alex. Forbes, relative to mine of quicksilver, Jan'y 7, 1847. No. 5."

"*Monterey, Oct.* 1, 1847.

"MY DEAR SIR:—You will no doubt be surprised to hear of my being in Monterey, and I am so myself. I, however, resolved to

take a trip to this country, which I have so long wished to visit, and arrived last afternoon in the 'William,' where I have been kindly received by the authorities, and no difficulty of any kind thrown in my way.

"I have sent to Mr. Alden to come over here, if he can, and take some people to the mine which I have brought with me, and it is very probable I shall accompany him, when I shall have the pleasure to see you.

"Mr. Walkinshaw has come with me, but without his family. He has been very ill all the voyage, and is now on shore in a very weak state, but I hope he will soon recover. I have a thousand things to say to you, but must wait till I have the pleasure of seeing you.

"Please inform the good Padre Real of my arrival, and tell him I don't write him, as I am a bad scribe at Castillano, but that I shall soon be at his domicile.

"Believe me to be, my dear sir, yours, very sincerely,

"ALEX. FORBES.

"James A. Forbes, Esq.

"We have had thirty-two days' passage.

"The American Army, under Gen. Scott, was within six leagues of the City of Mexico. 10,000 men—and a battle was daily expected. The Mexican say they have 32,000.

"Endorsed: Alex Forbes, on his arrival at Monterey, Oct. 1st, 1847. No. 3.

(In pencil.)—Alex. Forbes, Monterey."

"*Mina, 19th Nov.*, 1847.

"JAMES A. FORBES, Esq.,

"MY DEAR SIR:—I wrote you the other day, which did not find you at home. I am still here preparing the apparatus for making a better trial of the ores, but as Mr. Wallis, the artizan, is unwell, we go on but slowly. I am also very anxious to have the mine cleared out and put in a proper working state before I leave it, and for this purpose we have been sinking a 'Plan' at the 'Respaldo Alto' in order to run a 'Testero' across the vein, and to discover the value and abundance of the ores in its whole width. In doing this, we have most unexpectedly found that in this 'plan' there are no cinnabar whatever, although over it, in the upper part of the vein, there are ores. This puzzles us greatly, but we hope that in cutting

across we will fall in again with ores towards the 'Respaldo Bajo.' Can this mine be a 'Manto?' I must verify that, and so must you and the Padre with your own eyes. I see very good ores in the upper part of the mine in all directions, but why does it get into Borra lower down? The Plan is about five varas lower down than when you and the Padre wrought, and on the other side of the vein. The people will go on cutting across, and when they again get into 'Metal' I will send you a man on purpose. I am confident we shall find them, but there will always be about two varas or more of the vein next the 'Respaldo Alto' without ores; at least I think so, and hope nothing worse may be the case. We still see good ores on the upper part of the vein near the 'Respaldo Bajo,' where you and the Padre took out your ores.

"I have been somewhat alarmed about this Borra, but I hope there will ultimately be no cause for this; yet I have thought it right to inform you and the Padre, and have no doubt but that my *express carrier* will in a few days carry better news.

"I am, my dear sir, yours very truly,

"Endorsed: "ALEX. FORBES.

B.

"ALEX. FORBES, Mine of Almaden, Nov. 19, 1847.

"Addressed: Sr. D. DIEGO A. FORBES,

Ausente, Al Sr. PADRE REAL, Santa Clara."

"*Mine, 24th November*, 1847.

"For Mr. J. A. FORBES and the PADRE REAL, Santa Clara.

"We have at last found the vein or 'cinta' of ores which we were looking for, so that I have now the pleasure to inform you and the good Padre of our luck, as I promised I should do; but I fear this mine will be reduced to this *cinta*, and the great body of it will be *tepetate muerto;* but, perhaps, the *cinta* may be wider below than it is above. To see whether this is so or not, has been the object of our labors *since discovering the proper direction of the vein of the whole mine*, which discovery makes everything more plain. This direction was before *entirely mistaken;* of which and other things we will have a great deal to talk about when we meet. When Mr. Walkinshaw arrives and takes a look at the mine, I think we shall take a turn to the Mission. I expect him to be at Bernal's Rancho this afternoon.

"I may say now, that it is impossible we can go off the main vein

of the mine, as it is entirely different from the walls, (*respaldos*) they being of a hard rock, of quite different character, whereas the vein is quite soft and easily distinguished. All we have to do is to look for the *cintas* which have got ores, which in my opinion will be reduced to one not very wide.

"A. FORBES."

"*New Almaden, January* 19*th*, 1848.

"MY DEAR SIR:—I am very much obliged to you for your very prompt attention to the business in hand, and return the espediente immediately.

"I am much surprised at the result of your assay, and shall try what I have.

"It will, of course, be better to say nothing about it, particulary as I have already written to Monterey that there is no mine, nor does there appear to be any quantity of this kind of stuff. I hope soon to see the Alcalde.

"My dear sir, yours truly,

"A. FORBES."

"*New Almaden*, 1*st February*, 1848

"JAMES A. FORBES, Esq.,

"MY DEAR SIR:—I received an express last evening giving me all the news from Mexico, and informing me of the Natalia being about to sail for the Mexican coast and by which I have taken the opportunity to forward letters to Mexico.

"I have had the imprudence to open your dispatch. They told me that it contained newspapers and as I knew General Miller's hand, and it being a public letter, and that perhaps it might contain letters for me which I could not get if sent on, in time to allow me to write (if so required) by the Natalia; for all these reasons I broke open the packet. But although I know you will not be offended at what I have done, yet I would rather not have done so, as I think nothing whatever can justify one in opening directed letters to others without their previous sanction.

"You will find by the Alcanal of Guad[a] and the Iris, what is going on in Mexico, and what my friends in Monterey write is to the same purpose. The present party, Péna y Péna, Herrera, Otero, Bustamente & Co., are by far the most respectable party in the Republic, and there is a better, chance for their doing something better either for peace or war than ever that most infamous rascal, Santa Anna, and his party, would have done. Now that they have

got rid of that blackguard, there are better prospects than before, but the present party want energy, and the third party, the Puros, (Democrats,) will most probably upset them, when greater confusion than ever will ensue.

"You will find that the American President is getting more courage in prosecuting the war than before, and has recalled Mr. Trist, desiring the Mexicans to send to Washington if they wanted peace. I have, as you know, always thought that on their getting possession of a great part of Mexico, and their volunteers *covering themselves with glory*, the war would become popular, and they would *go ahead* and possess themselves of the whole of the Mexican Republic—particularly when they have got over the fears of European interference.

"You may now take my opinion a little farther, and set down Mexico as already, virtually, a part and portion of the *Union*, alias the U. S.

"It is said that Gen. Yañes goes to Tepic with 4,000 men; he is a superior kind of a man, and a most intimate friend of ours, so that our interests there will be protected in as far as depends upon him.

"As Ascona's letter gives a very good summary of the news, I send it for your perusal.

"This being a rainy day, and being desirous to communicate what I know in the shape of news, I inflict upon you this long epistle.

"I am, my dear sir, yours, very truly,

"ALEX FORBES.

"Please explain all this news to my good friend the Padre.

"You will see by Gen. Miller's list what a crash there has been in England. None of our friends are in this black list. Liverpool and Glasgow seem to suffer most.

"I am, my dear sir, yours, &c.,

"A. F.

"Addressed: James A. Forbes, Esq., &c., &c., &c., Santa Clara.
"Endorsed: Alex. Forbes, New Almaden, 1st Feb., 1848. No. 7,"

"*Tepic, April* 11, 1849.

"DEAR SIR:—We beg leave to refer you to Mr. Alex. Forbes letter of the 9th inst., respecting the arrangement of the affairs of the mine of New Almaden, and beg to recommend that negotiation to your best care and management until we can forward the neces-

sary instructions for your government. You may now rely on this mine being worked to the utmost of its capabilities of production and sale of quicksilver on the arrival of the apparatus, and we hope to make up for the delay which circumstances have hitherto prevented this important concern from being productive. We shall soon have the pleasure of sending you a list of the company of which the "habilitadores" are composed. The house of Jecker, Torre & Co., of Mexico and Mazatlan, and our own are chiefly interested, and as Don Ysidoro de la Torre has gone to Europe, he will concert with Mr. Barron everything which can tend to the successful development of this enterprise.

"We are, dear sir, your most obedient servants,

"BARRON, FORBES & Co.

"Jas. Alex. Forbes, Esq., San Francisco.

"Endorsed: Barron, Forbes & Co., *C.*, relative to habilitacion of New Almaden. April 11. 1849.

"*Tepic, May*, 20, 1849.

"SIR:—From certain circumstances which you have communicated to us, it may be necessary to purchase some lands in the vicinity of the mine and hacienda of New Almaden, in California. We hereby empower you to make such purchases as may be necessary to the secure possession of this mine and hacienda, or to effect such other arrangement as you may deem necessary for that purpose —the price of such purchase not to exceed five thousand dollars, without consulting with us upon the subject.

"We are, sir, your most obedient servants,

"BARRON, FORBES & Co.

"James A. Forbes, Esq.

"Addressed: James A. Forbes, Esq., California.

"Endorsed: Barron, Forbes & Co., authorizing the purchases of and. J."

"[*Very Private.*]

"Memorandum of the Documents which Don Andres Castillero will have to procure in Mexico:

"1st. The full approbation and ratification by the Supreme Government of all the acts of the Alcalde of the District of San

José, in Upper California—in the possession given by the said officer of the quicksilver mine situated in his jurisdiction, to Don Andres Castillero in December, 1845.

"2d. An absolute and unconditional title of two leagues of land to Don Andres Castillero, specifying the following boundaries: On the north by the lands of the Rancho of San Vicente and Los Capitancillos, on the east, south and west by vacant lands or vacant highlands.

"3d. The dates of these documents will have to be arranged by Don Andres. The testimony of them taken in due form, and besides certified to by the American Minister in Mexico and transmitted to California as soon as possible.

" *Tepic, May 27th*, 1849.

" Endorsed: Copy of memorandum left with Alex. Forbes for Castillero, in Tepic, May 27, 1849. I."

" *San Francisco, October* 28, 1849.

"MY DEAR SIR:—I have been detained at this place until the present moment, occupied in completing the arrangements explained to B., F. & Co., under the date of yesterday, having raised the sum of $27,180 67½ from Probst, S. & Co., and Webster alone.

"I must again call your attention to the importance of my suggestions relative to the perfecting the title of the mine of New Almaden; and, without entering now into the particulars already explained to yourself and to Mr. Alexander Forbes verbally, I desire only to impress upon your mind the vast importance of securing from the Supreme Government of Mexico the documents comprised in the memorandum left with Mr. Alexander Forbes, when I was in Tepic, for Castillero. By my other letters by this conveyance you will be informed of all the particulars of the transactions that have occurred recently in the affairs of the mine, and you will see the risk in which this valuable property is placed by the delay that has occurred in the acquisition of the documents referred to.

"I remain, my dear sir, yours, sincerely,

"JAMES ALEX. FORBES.

"William Forbes, Esq., Tepic.

"Endorsed: Copy letter to William Forbes (private) from San Francisco, October 28, 1849. III."

["*Private.*] *Santa Clara, October* 30, 1849.

"MY DEAR SIR:—By my letters to yourself and to B., F & Co.,

from the 22d to this day, you will be informed of the great danger in which the mine of New Almaden has been thrown, and the disagreeable and vexatious proceedings caused me by Mr. Walkinshaw and his associates in their denunciation of the mine for abandonment. You will, however, have the satisfaction of knowing, also, that I am to be reinstated in the possession of that property, both mine and hacienda, in two or three days hence, by judicial process.

"Although I feel much gratified at my successful defence of the case, yet I am extremly apprehensive of further difficulties in the event that those parties should succeed in purchasing the part of the land of the Berreyesas that they have offered to purchase (which embraces the mine and hacienda) for twenty-five thousand dollars —just five times the amount you all authorized me to pay for the same identical tract!

"Figure to yourself the position of the affair of the mine if I do not strike boldly at our opponents by purchasing the land at a higher price than they have offered to pay for it, and by thus frustrating their plans, secure the mine and hacienda from further risk.

"You will now readily perceive the great importance of my advice to you to purchase a part both of the lands of Cook and of the Berreyesas. You were of the opinion that this measure would not be necessary, in view of the supposed facility of getting the title to the mine perfected in Mexico.

"It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent to me as soon as possible. On the one hand, I depend upon the precarious and illegal possession of the mine, granted by the Alcalde of this district to Castillero, who was, in reality, the judge of the quantity of land given by the Alcalde; and, on the other side, I am attacked by the purchasers of the same land, declared by Castillero himself to comprise the mine. In the absence of the all-important document of the ratification of the possession so given, I am compelled to purchase the part of the land of the Berreyesas which Walkinshaw and his party have offerd to purchase, and you must not be surprised if I shall go far beyond the price that they have offered, because it is the only mode of securing the title to the mine and hacienda; for, if Castillero should fail in getting the desired documents from Mexico, is the sole mode of safety of this property.

"I shall endeavor to procrastinate, as far as possible, this pur

chase; and, moreover, to frustrate all the plans of Walkinsaw and his associates for accomplishing *their* purchase, and I do entreat you to use every effort to send me the document of the ratification of possession of the mine and the grant of land thereon at the very earliest opportunity, properly authenticated and certified, as explained by me when I was in Tepic. In one of my precited letters I requested you to send me a certified power of attorney from B., F. & Co. to you, authorizing you, as the representative of the Compañia de Abio, to appoint other attorneys in fact under you.

"The object of this is to be able to refute the allegations of the lawyer of Walkinshaw that you had no power to authorize me to take charge of the mine.

"I remain, my dear sir, yours, truly,

"JAS. ALEX. FORBES.

"Alexander Forbes, Esq.

"Endorsed: Copy of a letter to Alexander Forbes, (private,) October 28, 1849. II."

Tepic, 30th November, 1849.

"JAMES A. FORBES, ESQ., Santa Clara,

"DEAR SIR:—We had the pleasure to write you on the 13th inst. by the steamer "Oregon," the chief object of which was to enclose a notarial copy of the grant of land by the Mexican Government to Castillero, and which we hope has come safe to hand.

"We have perused with much interest and attention the whole of your letters and documents received by the steamers, the 'California' and 'Panama,' and we beg you will excuse us from minutely entering into a reply to those valuable and important papers. Suffice it to say, that we not only approve of your proceedings, but have to give you our most sincere thanks for the most energetic and able conduct in the whole affair, and we have to request that you will not hesitate continuing to take such steps as may seem to you fit for securing the mine from all attempts made by evil-minded persons to impede its being freely worked for its legitimate owners.

"We are glad to find that you had not been obliged to purchase Berreyesa's land. This is certainly a most important point, and we trust that the document sent will be of great consequence in that respect, but you will of course take care that no risk is run,

and you will do in this affair as your best judgment will direct you, keeping in view that at all hazard and at whatever cost the property of the mine must be secured. Castillero we expect will soon be here from Lower California, and if anything can be done in Mexico he is the fittest person to procure what may be wanted. It is incredible that Mr. Walkinshaw should lend himself to such proceedings when he considered the very large capital invested in this enterprise, and when he well knows that by the mining laws no "denuncio" could possibly be heard under the circumstances in which this mine has been occupied. We trust, however, that these vile machinations will by your active proceedings be put an end to.

"We hope you will by the time this reaches you have got up at least a part of the apparatus, and that some of it will be soon at work. The price of quicksilver here still keeps up, and the supply as yet not abundant. Every body writes of the very high price it bears in California, and we have no doubt you will in a short time be able to supply the demand and to send us the surplus to San Blas. Trusting to the continuance of your best exertions in behalf of all concerned in the mine of New Almaden,

"We are, dear sir, your most ob't servants,

BARRON, FORBES & Co.

"Endorsed: Barron, Forbes & Co., 30th Nov., 1849. No. 16."

"*Tepic, 30th November*, 1849.

"JAMES A. FORBES, Esq., Santa Clara.

"MY DEAR SIR:—I have received your most valuable letters by the two last steamers, "California" and "Panama," the latest dates being up to the 13th of the present month, and which gives the agreeable notice of Walkinshaw's most villainous proceedings having been upset. I hope you will forgive me for not entering minutely into all the proceedings. But I can assure you that we all feel the obligation we owe to you for the very able and decisive measures you have adopted in the whole of this affair, and I recommend you to proceed without fear of disapproval or waiting for instructions, in taking such measures as shall preserve this valuabe "negociacion" from any risk from those unprincipled claimants who have lately given you so much trouble, or from any other proceedings which may take place; being sure that such proceedings will be sanctioned by the company. We are quite of opinion

with you, that we should not be lulled into security from the belief that other proceedings will not be resorted to, and that principle will be acted upon, and every support from this will be given to what you may point out as necessary.

"As you will not, I hope, have now to employ the large sum you expected to do in the purchase of the Berreyesa's lands, you will have a large amount of funds for the object of the mines. All the drafts and orders for the value of gold have been honored.

"We are glad to learn that Mr. Probst has been so active in assisting you, and it gives me in particular much pleasure to find such a good understanding between you. I most earnestly hope the same friendship will take place between you and Dr. Tobin.

"Notwithstanding the many difficulties you must have in transporting the cargo of the Vicar of Bray, yet I hope a part of the apparatus will soon be got up to supply the demand of the placeres as well as to send us some here. It is of much importance to realize as much as possible of the large capital which now lies in the mine, laid out by the habilitadores, and to secure to the owners of barras something *certain* against an evil day which may some time or other overtake us.

"In new countries nothing is very certain, and I, for one, (and in which I am sure you will agree with me,) am most desirous to be in possession and to see others in possession of at least a part of the riches of this mine, which has cost me and others so much thought and so much labor. This I, as an individual, and for the good of all, beg leave to impress strongly upon your attention.

"I am, my dear sir, yours, very sincerely,

"ALEXANDER FORBES.

"James. A. Forbes, Esq., *Santa Clara.*

"Endorsed: No. 8."

["*Very private.*] *Tepic, December* 1, 1849.

"MY DEAR SIR:—The document sent up to you by the last steamer for the grant of the lands to D. Andres Castillero, was, by mistake, not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there.

"The one sent you was directed at the foot to the Governor of California, and the one deposited at Monterey was directed to D. Andres Castillero. The difference is, that by one the delivery by the

Governor was perhaps necessary to make the grant valid, whereas the other being addressed directly to D. Andres did not require that formality, nor was any other proceeding necessary, thus making it a better document than the greater part of the other titles for lands in California. I fear you may have made use of the notarial copy sent—if not, you will of course apply for the copy of the one at Monterey. I however, have hopes that your well known cleverness will have enabled you to find out this mistake, which would show itself, if you had applied for the document from Monterey. And at all events you may be enabled to withdraw the one sent and substitute the other; either, however, I take to be as good as the usual California titles, few of which have been officially delivered or sanctioned by the local authorities.

"Another difficulty however occurs. A document was made out in the city of Mexico when I purchased the Bars from Castillero, for the purpose of securing his consent and approval of the contract of Habilitacion; in this document is also inserted the grant of the two sitios, being an exact copy of what has been sent you, and directed to the *Governor*. All this will show you how that matter stands. And as I think this document may be of use to you, I send a copy of the whole, leaving you to your own good judgment, to make such use of this document, and of what I communicate, as you shall think proper.

"I shall send the document alluded to in a separate cover to Probst, Smith & Co.

"I am, my dear sir, yours very truly,

"ALEX. FORBES.

"There is an approval of the Habilitacion in all the documents of the sale of the other Bars.

"Endorsed: No. 9."

"[*Private*] *Tepic, Jan'y* 7, 1850.

"JAMES A. FORBES, Esq., Santa Clara.

"MY DEAR SIR:—I have received by Acapulco and Mexico, along with your other correspondence, your private letter to me, of the 25th and 28th of November, and beg to refer you to the letters of B., F. & Co. on the business of the mine.

"I am very sorry indeed to see that there is likely to be a difference between you and Dr. Tobin. This is a circumstance which may lead to very bad consequences, and it is strange that Dr Tobin

should throw obstacles in the way when he sees you surrounded with so many already, and which can only tend to lessen his own profits.

"It is clearly to be understood that no verbal agreement was made here with any one, nor any promises given which is not consistent with the contract as it is written. His brother never was engaged; on the contrary he told me that his brother went to see what could be done in California, and if nothing offered he would send him back to take our portraits. This might have been said as a joke, but shows that no employment at the mine was intended for him.

"No maintenance for himself (Dr. T.) or family was ever intended. He looked out here for a cook and took up one for that purpose. His new contract is much more advantageous than his former one with me, as he has his percentage on the whole two-thirds without limitation. I have read over this second contract with care, and it appears to me quite clear in respect to his charge at the hacienda.

"'ART. 2. The aforesaid James Tobin agrees to direct the operations of the extraction of the quicksilver to the best of his abilities, and is to have the said operations under his exclusive management.'

"This does not show that he shall have the general management of the hacienda.

"One of the causes for altering the contract, and for cancelling the limitation of his profits was, to make the contract less onerous as to the supply of ores, people and necessaries, which you will perceive by the 4th article. You are only bound to supply '*as amply as circumstances will allow*,' whereas, by the original contract with me, it was obligatory on us to supply all those which he might require.

"This, in the present state of things, is, I consider, of much consequence.

"This is my opinion of what Mr. Tobin has a *right* to demand, but I am sure you will not stand on mere points of right, or risk the interests of negotiation for trifling pretensions which may be put forth. Much must be sacrificed in principles to conciliate a troublesome person, and I still most earnestly hope that your prudence will enable you to keep up cordiality between you. I shall write my opinion to Dr. Tobin, and give him my strongest advice to lay aside all vexatious pretensions, and enjoin him to proceed in good will and amity, which can only tend to his own interests and those concerned in the mine. I hope he will listen to my advice.

"The amount of capital is getting to be enormous, and the company are beginning to get astonished. If, however, you can once

get under way all will be well, if you could only get a couple of cylinders up in any temporary way. They would supply the placares.

"Whenever you have more than is wanted for that, you will, of course, send it down here, more or less, by the steamer.

"Strange, as it appears to me, a Mexican merchant, 'Lizardo,' sends up one hundred and thirty-six flasks by this steamer, and between two and three hundred go by next conveyance. It is shipped by B., F. & Co., as agents! We have not one bottle here; but there are some still of the California quicksilver in Sonora.

"I am glad you have taken young Mr. Thom in your house; please remember me to him, as also to Mrs. Forbes, and your family.

"I am, my dear sir, &c., yours truly,

"A. Forbes.

"James A. Forbes, Esq., Santa Clara.

"Webster will go up with a pacatillo by this steamer if he can get his things on board. If you can do anything for him you will oblige me.

"A. F.

"By the tenor of your letter, I have hopes that you will have got rid of the villanous proceedings of Walkinshaw and his party.

"I hope the document which now goes up, (the Habilitacion, &c.,) will be useful. Castillero is somewhere in Lower California. We have not heard from him, but he must be somewhere about La Paz.

"Mr. Spence of Monterey writes me of date of the 22d Nov., that he had advanced to Mr. Walkinshaw about $2,000, and informs me that although he had written him several times he had received no answer, and that neither principal nor interest had been paid. I have advised Mr. Spence to inquire of you respecting this transaction.

"I hope Mr. Probst, with your assistance, if necessary, will push the claim of the Mazatlan debt against Walkinshaw.

"I have a letter from Alden, in which he speaks of Walkinshaw in strong terms. I hope you will keep poor Alden in your service; he speaks of his former service not being properly paid for, and of his accounts not being settled.

"Endorsed: No. 10."

"*Santa Clara, 29th Jan'y, 1850.*

"MY DEAR SIR:—I have rec'd the copy of the contract of Habilitacion and as you request me to address myself to B., F. & Co., on the affairs of the mine, I have now written to them upon this particular subject to which I request your earnest attention, not as regards the habilitacion, but another document which you know of.

"I am, my dear sir, yours faithfully,

"JAS. ALEX. FORBES."

["*Very Private.*] *Tepic, February 3d*, 1850.

"James A. Forbes, Esq., Santa Clara.

"MY DEAR SIR:—I had the pleasure to write you of date the 7th January, which went by last month's steamer, to which I refer. I have since received your letters by Reyes dated the 27th and 31st of December, and 8th of January. I shall not go minutely into the whole valuable information you give me, nor into the statements so very interesting to myself and those concerned in the mine of New Almaden. By those communications I have every reason to believe that, by your indefatigable and energetic proceedings you will be enabled to defeat all the vile attempts which have been made to rob the legitimate owners of their property.

"The conduct of Dr. Tobin is inexplicable, but I think I can perceive that you are somewhat of opinion that he may be heard and protected by the Company, but I will at once put you right upon that point, and assure you such will not be the case. All here are most indignant at his conduct. You must, and will, be supported, and all I wish and hope for on your part is, that you act in a manner towards him which may enable you if possible to avoid a rupture and contentions which may lead to bad results. You say that Dr. Tobin comes down in the next steamer, if so, he will be here in a few days. This I shall not be sorry for, for the matter would then be soon settled. He would most assuredly not be asked to return, nor even permitted. He has no right to desert his post, and I hope you have not given him leave of absence. I have no doubt but that you could, with Gay, Alden, and the other person you mention, do well enough for a time, and easily put up a part of the apparatus and work it until a proper scientific person can be procured and sent up to you.

"It so happens that almost the whole of the "accionistas" and

"aviadores" of the mine will be here in a few days. Mr. Barron is now here, and is attorney for those absent. La Torre comes here to visit Mr. B. Castillero has returned and is also here, so am I and William Forbes. This leaves out only the four California bars, and I think I may venture to act for you, if necessary, as you verbally told me I might. This will give us power to deal with Dr. Tobin if he comes this way, and to regulate any other matters which may be thought necessary. For my own part I have no power, as you know, the management being in the hands of others, and therefore, I beg you will take all I say as purely *private and confidential*, without attaching any authority to my suggestions. But, of course, as I am a proprietor, and in the confidence of the managers and other proprietors, my opinions and advice may be worth attending to, and be of some use to yourself as well as to them. I shall continue to write to you as long as I remain here, and will be most happy at all times to hear from you.

"I wrote by last packet to Dr. Tobin as a friend, and attempted to conciliate him in a mild way, perhaps he makes too much of this letter, and I think it better to send you a copy to enable you to see exactly what I have said to him. His leaguing himself with Mr. Walkinshaw is too bad. Reyes has told me of all that has passed, which is almost incredible. I am glad to find that you are peaceably to get rid of Mr. W. Mr. Tobin has sent a plan of his proposed establishment, this you must on no account allow to be put in execution. You are aware that it would never do to go about large magnificent works at once, particularly as you know the whole must be at the cost of the "aviadores" and left for the proprietors at the end of the contract. You are acting for the aviadores, and it is your duty to restrict the works within reasonable bounds, and to only erect temporary, and absolutely necessary, works until some funds shall be realized from the mine. However desirous that it may be that the works should be set up by Dr. Tobin, yet if he will not go on in good faith, or if he attempts to injure the company, or refuses to obey your just commands, and resists your authority, or stops or impedes the works, and thereby breaking his contract, I think he may be discharged by *you*, always taking care that you have a very clear case, and nothing left in doubt to cause litigation. But this is only my private opinion. I have no authority to empower you to do so, but it would no doubt be approved by the company, none of whom look favorably on the

Doctor's proceedings. The most effectual and safe way, however, would be his coming here *without leave.* He has not written by last opportunity, nor will he be written to by this steamer.

"I have every reason to believe that the documents you mention will be *found* in the City of Mexico, and as Mr. Castillero will return there they will no doubt be procured, but we are at some loss to know what is exactly wanted; and I beg you will, by next steamer, give a sketch of the documents you allude to, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two sitios *directly* to Castillero, and registered in Monterey, nor am I sure if this will mend the matter. In a few days, however, we will again hear from you and act accordingly.

"One last resort I will mention to you, and it is with great repugnance that I do so, which is, that if the Berreyesas were unreasonable and untractable, or insist on the extension of their lands to our hacienda, the company would be justified in promoting the invalidation of their own title to their Rancho.

"If they make it over to any one else, and particularly to our enemies, certainly this course must be pursued. If no opposition or disclosures are made, and if the American Government turn out to be liberal in conceding the Ranchos to the present holders, the Berreyesas and others may be left in possession; but if active measures were taken by an adverse party, many of the titles would be worthless, and I have reason to think from what came to our knowledge when I was in California, the title of the Berreyesas is not of the best. This I throw out for your consideration and I should think these people would do themselves no good in opposing you.

"We think at present that it may be the best place to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas given by the Alcade on giving possession of the mine. As a doubt may have started as to whether the Alcalde, acting as the "Juez de Mineria," had a right to make this grant, yet if approved by the Government of Mexico before the possession of the country by the Americans, there could be no doubt on the subject. This takes in our hacienda, and unless opposed by the Berreyesas would, I should think, settle the question.

"Castillero says such approval was given, and that on his arrival

in Mexico he will procure a judicial copy of it. This is the plan we shall adopt if we hear nothing from you to alter this resolution.

Since writing the foregoing I have looked over your private letter to Wm. Forbes, dated 18th October, and find you state the limits or boundaries as follows.

"The boundaries must be expressed as joining on the north and northwest by lands of the ranchos de San Vicente and de los Capitancillos, and on the east, south and west by Serainia or 'tierras baldias.'

"Castillero is not certain of accomplishing this latter plan, and thinks the first, that is, the 8,000 varas, the best.

"There goes up by the steamer another bill against Mr. Walkinshaw, and in favor of B., F. & Co., for $1,000, so that Probst, Smith & Co., have in our favor and against him:

"By A. Forbes, accepted.....	$1,758
"B., F. & Co., about.....	10,000
"B., F. & Co., bill.....	1,000
"In all.....	$12,758

"I am, my dear, sir yours, very truly,

"ALEX. FORBES.

"James A. Forbes, Esq., Santa Clara.

"I send you five Atlas newspapers.

"Endorsed: Private, A. F. 3d February, 1850. Answered 26th February. No. 11."

["*Private*] *New Almaden, February* 26, 1850.

"ALEXANDER FORBES, ESQ.,

"MY DEAR SIR:—Your favor of the 3d instant came duly to hand, and in answer to that part of it relating to the documents sent up to me in November, serving as titles to this property, I will again address you '*por seperado.*'

"I really did have more faith in the tact and ability of Castillero, to perceive the important objects set forth in my memorandum of what was to be done nine months ago, in Mexico, by that eccentric individual, and that with the powerful influence that he was to have exercised by the efficient aid that was to be lent to him, he would meet with no obstacle to the attainment of the important documents explained in that memorandum. But Castillero has deceived himself, for he thought that boundaries were not necessary, as I shall

presently shew you. He succeeded in obtaining the grant of two sitios to himself on the mining possession in *Santa Clara* while that very act of possession declares that the mine is situated on the lands of one José R. Berreyesa, five leagues distant from Santa Clara, and you will at once perceive that such a discrepancy would not fail to attract the attention of the U. S. Land Commissioners and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

"Without troubling you with what I have so many times written and explained to you verbally, on the importance of the acquisition of the *document*, I will only say now, what it *must* be, and it is this:

"1st. A full and complete ratification of all the acts of the Alcalde of this jurisdiction in the possession of the mine.

"2d. A full and unconditional grant to Castillero of two sitios of land covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you in Tepic. Both of these documents to be of the proper date, and placed in the proper Governmental custody in Mexico, and

"3d. The necessary certified copies of them duly authenticated by the American Minister in that capital, taken and sent to me at the earliest possible moment.

"You will receive my advice of the 19th inst., regarding my views of not supplying W., with any quicksilver.

"Yours sincerely,

"JAS. ALEX. FORBES.

"Endorsed: Letter to A. F. *Private*, IV. February 26, 1850.

"*Tepic, March* 2, 1850.

"DEAR SIR:—We duly received your letters up to the 29th of January, per steamer Panama, which have had our best attention, and as our friend, Don Ysidoro de la Torre of Mazatlan has been appointed, and has consented to proceed by this steamer to California, with full powers to act in behalf of all concerned, it is needless to enter into any particulars respecting the various matters contained in your letters, as you will be enabled personally to communicate your views to him, and to arrange everything in the best manner possible. Mr. De la Torre came to Tepic to meet Mr. Barron and the others concerned in this negotiation, and it was deemed necessary that some of the partners of the "habilitacion"

shou.d proceed to New Almaden in order to consult personally with you, and to arrange respecting the future operations of this enterprise, and Mr. De la Torre has been prevailed upon, at much inconvenience to himself, to undertake the present charge.

"We are sure no one could be named more agreeable to you than Mr. De la Torre, and have no doubt but that his presence will be most useful in sanctioning and arranging a plan of future operations, and of assisting in adjusting any difficulties which now exist, particularly as he has the full authority of the association to act as to him shall appear necessary. Mr. De la Torre takes up with him Dr. Tobin, in the hopes that he will resume his labors and act in conformity with his duty.

"Mr. Barron and Don Andres Castillero are about to proceed to the City of Mexico, and will attend to what you have recommendcd.

"Soliciting your kind attentions to our friend, Mr. De la Torre, we are, dear sir, your most obedient servants,

"BARRON, FORBES & Co.

"James A. Forbes, Esq., New Almaden.

Endorsed: No. 12."

"*Tepic, March* 11, 1850.

"MY DEAR SIR:—The Oregon's letters have just come up, and I give this a chance of reaching San Blas before the arrival of the Panama steamer. Mr. Barron and Castillero have gone off to Mexico, and I write them to-day *respecting the document you know of, which if possible will be procured.* The news of your having got up four cylinders, gives us all much joy, and I gave the good news to my friends. M. La Torre don't expect this—unless he knows by the steamer which touched at Mazatlan. You will perhaps see him and Dr. Tobin before this reaches you, who both go by this conveyance. *Let us have Quicksilver* and all will be well.

"I am most happy to hear you have found an abundant mine of Limestone, this is of much importance. Your official letter about the vessel will be forwarded to the Foreign Office.

"In great haste, yours truly.

"A. FORBES.

"Endorsed: Alex. Forbes, March 11th, No. 14."

"*Tepic, April* 7, 1850.

"MY DEAR SIR:—I wrote to you by the California, dated the 23d February, and since then have received by the "Oregon" yours of

the 19th of that month. I was very happy to hear that you had got up some of the cylinders, and trust that you are at this time distilling quicksilver. I hope Dr. Tobin will now attend without any difficulty to the superintendence of the apparatus, and am sure that you will on your part do everything in your power to promote harmony and forward the interests of all concerned. You will, I know, find great relief and pleasure by the arrival of your friend La Torre. He will during his stay take much responsibility off your shoulders, and, from his decision and conciliatory disposition assist in smoothing many of the difficulties which surround you. Mr. Barron and Castillero have arrived in Mexico, and have every prospect of finding the documents you are aware of, and which will, of course, be forwarded as soon as possible.

"I am, my dear sir, yours, very truly,

"ALEX. FORBES.

"James A. Forbes, Esq., New Almaden.

"I forward a letter received from Mr. Murray, of the foreign office.

"Addressed: James A. Forbes, Esq., New Almaden.

"Endorsed: Alex. Forbes, April 7, 1850."

"[*Private.*] *Tepic, June* 6, 1850.

"MY DEAR SIR:—I had the pleasure to receive your letter of the 28th of April by the steamer, but of course not in time to reply by the one from Panama, which arrived the day after that from San Francisco.

"I remark what you say of Dr. Tobin and the cylinders, which has caused me some uneasiness, and I wait with anxiety to know how those he is putting up himself will succeed, which we expect to do by the steamer which ought to arrive at San Blas on the 10th instant.

"I find that it has been deemed necessary to appoint an American citizen as manager of the mine, and am most happy to know that this meets with your approbation. This approval on your part I am quite sure will be estimated as it deserves, and shows to those interested in this enterprise that you do not hestitate to sacrifice your own private interests for the general benefit of the concern. For my own part, I feel most grateful and highly obliged, and the members of the house of Barron, Forbes & Co express strongly the same feeling.

"We are all convinced that whoever may be in the management of the New Almaden will receive the assistance of your knowledge and experience, and the company and proprietors cannot fail to be sensible of your services. It gives me great pleasure to hear from yourself as well as from M. La Torre, that the closest friendship had existed between you, and that both were animated by the same desire of making the mine productive. I had the pleasure to know Mr. Halleck at Monterey, and I think a better selection could not have been made. I think he is a gentleman with whom you will be much satisfied as manager of the mine, and who I have no doubt will be glad to avail himself of your experience in whatever may be new to him.

"I am very happy to hear that Mr. Walkinshaw has been settled with, and that all annoyance from that or any other quarter has ceased.

"I shall avoid saying anything respecting the Berreyesa affair till the letters by the steamer come to hand, which will no doubt confirm the arrangement between them and Mr. La Torre.

"I am, my dear sir, yours truly,

"A FORBES

"Endorsed: No. 15."

"*Tepic, January* 10, 1851.

"J. A. FORBES, Esq., Santa Clara,

"MY DEAR SIR:—I was duly favored with your obliging letters of the 12th and 29th of Nov., in which you mention, that I had stated some disappointment by your not writing, and allude to some other matters I have no recollection of. I have always reckoned upon you as a friend, and am well convinced that you have every disposition to promote the interests of the mining negotiation as much as in your power, which William Barron confirms in his late letters to the house.

"We have nothing to fear from the lawyer Jones should he come here, but I understand he has gone to the Sandwich Islands, and is likely to make a journey to the other world. Mr. Barron has caused a most minute examination to be made in the archives in the city of Mexico, the result of which has been that, neither Alvarado nor Micheltorena were authorized to grant titles for lands in California, nor does there appear to have been any approval or confirmation of such grants as they took upon themselves to

grant—so that the title of the Berreyesa's land, either by Alvarado or by Micheltorena, if opposition is made, is valueless.

"This being the case, few of the California titles would be good if determined by the vigorous application of the Mexican law Mr. Barron has procured documents to confirm this view of the case, but we have resolved not to make use of such documents except in our own defence, as we do not wish to injure any one; but in the case of the Berreyesas we are compelled to use all means in our power to counteract their proceedings or those of their abetters if they persist in their late proceedings.

"If it was not that I am an interested party I would recommend to them to secure their Rancho by silence, for I am well assured that by adopting hostile measures against us they may lose it altogether. The Rothschilds have a large quantity of quicksilver on hand, and the miners thought that by competition between them and New Almaden it might come down greatly in price, and kept off from purchasing, but an agreement has been come to between both parties, by which this competition is done away with, and the price will be maintained at a fair rate.

"In consequence, however, of the expectation of the miners few sales have been made, and little of the proceeds of sales realized, but from the arrangement alluded to, it is hoped that the sales will soon be considerable. You will find by B., F. & Co.'s letter that your wishes have been complied with, in debiting you with the $1,700 in the account of your share of the sales of quicksilver.

"With best respects to Mrs. Forbes and your family, I am, my dear sir, yours, very truly,

"ALEX. FORBES.

"Addressed: James A. Forbes, Esq., San Clara, California.
"Endorsed: Alex. Forbes, Jan. 10, 1851. No. 17."

These were the letters in the package deposited with Davidson. Mr. Lawrence and Mr. James Eldridge, who had an interest adverse to that of the claimants, had agreed to pay James Alexander Forbes $10,000 down, and $10,000 more at a future time, for the privilege of using them to compel a compromise and it was stipulated that until needed for that purpose they should remain in Mr. Davidson's custody, whence they could

not be taken by either party without the consent of the other The process which brought them into Court was issued at the instance of the District Attorney of the United States, who, in doing so, acted upon his own sense of official duty, not prompted by any private party, and without knowing any thing of the agreement between Lawrence and J. A. Forbes. Forbes received the consideration he bargained for.

There was another letter from Alexander Forbes to James Alexander Forbes, not in the package produced by Davidson, of which the following is a copy:

"*Monterey, March* 28, 1848.

"My Dear Sir:—I have to apologize for not writing you before this, as I promised I would, respecting the purchase of your shares in the mine of New Almaden, but really, as your opinion of their value is so widely different from mine, I considered it almost hopeless to make you any further proposals.

"I do not, however, leave this without making the necessary arrangements to effect that object, and have therefore authorized Mr. Walkinshaw and Manl. Dias to wait on you with my final offer for the purchase of those shares.

"Were I not already so deeply interested in this negotiation I would never think of investing another dollar in it, but this interest renders it necessary for me to have the control of all the shares, in order that I may dispose of the whole, whenever an opportunity may offer, and save myself from the heavy loss that would ensue, should it unluckily leak out that, in fact the documents procured by Castillero in Mexico, as his title to the mine and lands, were all obtained long after the occupation of California by the Americans.

"This unfortunate irregularity cannot be easily repaired, and serious objections might be made even to the legality of our new act of possession.

"I need scarcely remind you of the importance of preserving profound secresy in all these matters, and in case you do not accept my offer, I hope you will not fail to send me your power to act for you in any arrangement I may make.

"I send you three vols. of the Mechanic and Engineers' Magazine, which I beg your acceptance of, and I hope you will continue

your correspondence as usual, and inform me of what is passing in California.

"I am, my dear sir, yours, very truly,

"ALEX. FORBES.

"James A. Forbes, Esq., Santa Clara."

J. A Forbes produced this some months after the others had been given in evidence. He swore it was an exact and true copy of the original, which he had received in regular course, and that the original was in the handwriting of Alexander Forbes. Why he did not produce the original itself he undertook to explain, by declaring that he had it in a carpet-bag at a hotel in San Francisco, and while he was out it was stolen; though his room and his carpet-bag were both locked, and he did not perceive, when he came back, that either had been disturbed. He was subjected to a long cross-examination, which did not establish the integrity of his conduct, or the good faith of his statements, but seriously injured his credit. In addition to this, the claimants attacked his general character.

James J. Birney was called to support the statement of Forbes, and he swore that the copy of the letter offered in evidence was made by him; that it was a true copy; that he knew the handwriting of Alexander Forbes, and that the original, from which he copied it, was written by Alexander Forbes. The answer of the claimants, to Birney's testimony, was the production of witnesses who swore that his reputation for veracity was not such as to make him a safe witness.

When Mr. Trist went out to Mexico, in 1848, to negotiate a treaty of peace, he was instructed by Mr. Buchanan, the Secretary of State, to insist upon a cession of certain territory, and to stipulate that all grants, in the ceded territories, made by Mexico, after the 13th of May, 1846, should be absolutely null and void.

Mr. Trist reported to the State Department the treaty made by himself and the Mexican Commissioners, which contained the following declaration on the part of Mexico:

"The Mexican Government *declares* that no grant whatever of lands in Texas has been made since the second day of March, one

thousand eight hundred and thirty-six; and *that no grant whatever of land, in any of the territories aforesaid, has been made since the thirteenth day of May, one thousand eight hundred and forty-six.*"

Mr. Trist, in his dispatch to the State Department of January 25, 1848, (accompanying the treaty,) explains why the treaty had taken this form instead of the stipulation which he had been instructed to make.

"With respect," said he, "to grants of land made by the Mexican authorities, the *proviso* contained in my instructions *was strenuously objected to upon a point of national honor and decorum. No such grants had been made since the 13th May*, 1846. *This they knew, and consequently the proviso could have no practical effect. But it is implied that they have been made*, or *might have been made, and that, nevertheless, the Government committed the injustice of revoking them;* which, in fact, it had authority to do. Moreover, *it involved an acknowledgement* that, from the day when hostilities broke out on the north of the Rio Bravo, *the Mexican Government had lost the right to make grants of land in any part of its territory subsequently occupied by us. Feeling the force of these objections, I requested to make sure of the fact stated by them*, and also in regard to no grants having been made in Texas since the revolution, which had been incidentally mentioned by one of them, (the Mexican negotiators.) *And this having been done in a manner which left no shade of doubt on their minds, the declaration which will be found at the end of Article* 10, *was agreed upon in lieu of the proviso.*"

After the treaty had been ratified by the President and Senate of the United States, with some amendments, Messrs. Clifford, of Maine, and Sevier, of Arkansas, were sent out as commissioners to exchange ratifications with the Mexican Government. Their despatches to the State Department, only a part of which has been printed, show that there was much discussion between them and the Mexican Minister of Foreign Affairs on the subject of the land grants, and particularly with respect to the effect which might be produced upon the titles by the suppression of the 10th Article The necessary explanation was given to quiet these fears. The dispatches do not state specifically what the explanations were, because the substance of them was written down in the form of a *protocol* and signed by the representatives of the two Governments. The following is the explanation referred to, so far as it relates to this subject:

"The American Government, by suppressing the tenth Article of the treaty of Guadalupe, did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the Article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

"Conformably to the law of the United States, *legitimate titles* to every description of property, personal and real, existing in the ceded territories *are those which were legitimate titles under the Mexican law in California* and New Mexico *up to the 13th of May*, 1846, and in Texas up to the 2d of March, 1836. * * *

"And these explanations having been *accepted* by the Minister of Foreign Affairs of the Mexican Republic, *he declared in the name of his Government, that, with the understanding conveyed by them, the said Government would proceed to ratify the treaty of Guadalupe as modified by the Senate and Government of the United States.*"

Most of the evidence was given after the cause came into the District Court. This is but an outline of it. Many documents and numerous details of fact, some of them not altogether without a certain degree of importance, are unavoidably omitted; the object being to give only such as appeared necessary to make the arguments of counsel and the opinion of the Court intelligible.

The Land Commission (Mr. Commissioner Thompson, dissenting,) confirmed the title of the claimants "to the mine, with the right of enjoying the privileges as mine owner, under the Mexican law, of three thousand varas in every direction from the mouth of the mine." All the Commissioners concurred in rejecting the claim to two leagues, under the Lanzas dispatch.

The claimant appealed to the District Court from so much of the decree "as rejects his claim for two square leagues of land granted to him in colonization," and the United States appealed from that part which confirms the mining privilege.

The opinion of the District Judge was in favor of confirming the claimant's title to the two leagues under the dispatch, but the Circuit Judge being of a contrary opinion, that part of the claim was rejected Both Judges agreed that the mining title

claimed under the proceedings before the Alcalde, was legal and sufficiently proved, and it was accordingly confirmed with seven pertinencies each of two hundred varas square to be laid out in such manner as the claimants might elect, but so that the original mouth of the mine should be within them.

From the decree of the District Court both parties appealed to this Court.

Mr. Archibald C. Peachy, of California, *Mr. Charles O'Conor,* of New York, and *Mr. Reverdy Johnson,* of Maryland, for claimant.

In November, 1845, Andres Castillero, a Mexican military officer, whilst journeying through California toward Sutter's Fort, on a public mission, discovered in a spur of the *Sierra Azul* or Blue Mountains, seventeen hundred feet above sea-level, the quicksilver mine now in question. The place had previously attracted attention. Openings had been made by the Indians and by the early white settlers. But it was Castillero "who first found metal in it;" and, therefore, by the express words of the Mexican law, he is "held as the first discoverer." Ord. of 1783, tit. 6, Art. 7, Halleck's Collection, p. 225. Nor has any rival yet appeared; so his merit in this respect is unquestionable. He forthwith reported the fact to A. M. Pico, the nearest Alcalde, who gave him juridical possession "according the laws," as it was expressed, referring to "the Ordinance on Mining." Castillero and his assigns, now known as the New Almaden Company, have had possession and worked the mine ever since. At the cost of a million of dollars they have fully developed the product. Great benefit has thence resulted to the gold and silver-bearing regions of North America. Until this discovery they were mainly dependent on Old Spain for quicksilver, the very life-spring of their industry. They are now amply provided with that indispensable material from a home-source at less than one-third of the former cost.

According to proofs superabundant, and which, indeed, there has been no attempt to refute by evidence, the discovery, the denouncement, as the action before the local magistrate is somewhat inexactly termed, and the early working of the mine were matters of the utmost public notoriety in California during the

winter and spring of 1845–6. These facts were officially communicated to the State Department by our consul at Monterey early in May, 1846. They were published in the Sandwich Island newspaper in July of that year, and were, soon afterwards, reproduced in the public journals of the Mexican capital.

Lured by the reputed richness of the mine, two sets of speculators from the Atlantic States respectively purchased neighboring unsurveyed farms or ranches, soon after the acquisition of California, each hoping to procure such a judicial survey as would bring the mine within their boundaries. *Berreyesa's Case*, (23 How. 499;) *Fossat's Case*, (20 How. 413, and 21 How. 445.) The claim now before the Court is indebted to this circumstance for the attempt to question its validity.

Castillero's title was derived from the Mexican Government; but, by the Treaty of Guadalupe Hidalgo, dated February 2, 1848, our Government solemnly pledged itself that "property of every kind" so held should "be inviolably respected." See Treaty, (9 Statutes, p. 929, Art. 8.) The Act of Congress, passed March 3, 1851, (9 Statutes, 631,) required all such titles to be established before certain commissioners, subject to an appeal to the District Court, and an ultimate appeal to this high tribunal. If a design to confiscate private property in violation of the treaty could be imagined, the pure and lofty tone of the 11th section would at once repel the idea. It provides that "in deciding upon the validity of every claim," the tribunals are to be governed by that treaty, "the law of nations, the laws, usages and customs of the Government from which the claim is derived, the principles of equity and the (prior) decisions" of this Court, "so far as they are applicable." The decisions thus referred to are those "in relation to titles in Louisiana and Florida which were derived from the French or Spanish authorities previously to the cession" of those States. *Fremont's Case*, (17 How. 553.) The most enlightened and liberal equity pervades that series of decisions. No honest claimant could desire that his title should be tested by a higher or purer standard. In one of them, *U. S.* vs. *Kingsley*, (12 Peters, 485,) the Court repudiates the narrow rules of the common law." saying, that "it has not applied nor

will it apply" them. In the same case, at p. 484, it is admitted that "the United States succeeds to all the equitable obligations" of the former government; and that the Court in construing its grants must be governed by its supposable motives and policy in making them and securing them by treaty. In *Fossat's Case*, (21 How. 451,) the same doctrine is thus emphatically declared:" The United States did not appear in the Courts as a contentious litigant, but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their Executive Government to comply with that obligation."

The law officers of the Government in resisting this claim, do not seem to have acted upon such principles or to have acknowledged the influence of such motives. Their course in relation to this controversy entitles it to a place among the "*causes célèbres*" of the age. Castillero's claim was presented to the Land Commissioners in December, 1852. Strict and formal proof having been insisted upon, their decision was not rendered until January, 1856. The District Court pronounced its judgment in January, 1861, and the case is now here for final adjudication.

Castillero's title was twofold.

Under laws which, with occasional modal variations, had existed for centuries, and were in force in California when we acquired that country, any person discovering a mine, whether in public or private land, was rewarded with a perpetual property therein and ownership thereof, and of an easily ascertainable amount of surface, immediately above the mine, called *pertenencias* or mining spaces. The fact of discovery was to be represented to the proper local authority, and that tribunal was required to register it, to perform certain other acts, and to give the discoverer immediate possession. In this case, all these things were done. Exactly in what way, and with how near an approach, in point of form, to the precision of a Coke or a Chitty, we may speak if we shall happen to hear any intelligible exceptions to the mode adopted.

A very productive quicksilver mine, such as this was believed to be at the outset and has proven to be, was a desideratum of

the very highest importance to Mexico. That metal is "sparingly distributed in nature, and its mines are very rare." Ure's Dict. "Mercury." The Royal mines of Almaden, in Old Spain, having but one even tolerably formidable rival, had supplied the world with it for twenty-five centuries. Though of prime utility for scientific purposes, and in a very few of the arts, its chief consumption results from its use in separating gold and silver from their crude ores. 5 New Am. Cycl., titles "Cinnabar," "Almaden;" Ure's Dict. "Mercury;" 1 McCulloch's Geog. Dict. "Almaden." Vast quantities are thus employed; a pound of quicksilver is usually consumed for every pound of the precious metals produced by mining. When the gold and silver ores are poor, that is to say, when they produce a low percentage of the metal, the consumption of quicksilver is proportionably increased. The Mexican ores are poor; and, consequently quicksilver was much in demand. Prior to Castillero's discovery the *Junta de Fomento* or National Board for the Encouragement of Mining, sustained by special taxes and imposts and other legislation, was constantly engaged in strenuous efforts to obtain it at home, and thus to lessen the dependence on a foreign source. This dependence was felt to be a grievous burden. In fact it was so; for, in and prior to 1845, the date of Castillero's discovery, three-fourths of the annual supply was obtained by importation from Old Spain. By the Mexican law of May 24, 1843, numerous exemptions and privileges were enacted in favor of quicksilver mining. It "granted a premium of $25,000, to each one of the first four operators who should [shall] extract in one year from the mines of the Republic, 2000 quintals of liquid quicksilver." It further decreed that $5 should "be paid for the term of three years for each quintal of quicksilver" so produced. Halleck's Collection, p. 453, arts. 4, 5. During and prior to 1843 and 1844, the National Junta commissioned experts for the purpose and prosecuted laborious and costly but essentially fruitless explorations for this mineral. Every department of the Republic was thus examined except, indeed, California. That remote and thinly peopled region, says Mr. Negrete, a witness of high intelligence, was regarded as "the end of the world." Trans-

cript, p. 2435, question 189. Its mineral wealth was not even suspected until 1848. See Soule, Gihon & Nisbet's Annals of San Francisco, p. 130; Transc. pp. 2680, 3052.

In the rude and experimental way which was alone practicable, Castillero took immediate measures to work the mine; and, in March, 1846, he sent a messenger to the authorities at the city of Mexico with specimens of the ore, and announcing his discovery. Soon afterwards he followed in person. During the first week of May in that year, he appeared before the *Junta*, and, orally as well as in writing, he laid before that body an application for aid in his enterprize. On his first communication, and prior to his arrival, proper assays had been made and the remarkable richness of the ore ascertained. The facts were officially communicated by the *Junta* to the appropriate department. The Minister laid them before Paredes, who was then President, and, as such, exercising extraordinary powers. Acts of State, dated May 20th and 23d, 1846, recorded in the public archives of Mexico, copies of which have been exhibited, show that the possession which Castillero had received from the local magistrate was confirmed by the Government, and that two square leagues of land around the mine were also granted him by the President, in order to provide a supply of fuel for his works.

On these documents, and proof of the connected facts, the Commissioners held that the land-grant had not been perfected; but they confirmed the claim to the mine with a *pertenencia* of three thousand varas in every direction from the mouth of the mine. This was an extra-sized *pertenencia*, and was equal in extent to about two-thirds of the land claimed under the two-league grant. The District Court also confirmed the mining title, but with only seven ordinary or regular pertenencias, comprising about fifty acres of surface. This was, in point of law, the true extent of the mining title; so far as it depended on mere discovery and the act of the local magistrate. Judge Hoffman was of opinion that the two-league grant was valid and perfect; but, on this point, the Circuit Judge concurred with the Commissioners.

(The question whether a mining title was "*land*" within the meaning of the Act of 1851, and, therefore, cognizable in this proceeding, gave rise to considerable discussion in the tribunals below, and the point was argued at length here. The Court having affirmed the jurisdiction, the points and arguments on this head are omitted.)

The resistance to this claim, before the Commissioners, was conducted in a very adverse spirit. But the controversy was confined to points of law. No doubt as to any matter of fact was suggested until the summer of 1857. At that time, the New Almaden Company had been about twelve years in actual and notorious possession and engaged in producing the mineral. During most of the time, they had costly and extensive works in full operation, and were supplying the whole country with quicksilver. They had never been disturbed or interrupted in the exercise of their dominion as owners. For eight or nine years they had been engaged in active litigation with the speculators before alluded to, who had bought interests in the neighboring unsurveyed ranches, and who are known in this Court as the *Berreyesa* and *Fossat* claimants. More than a year had elapsed since the decision of the Commissioners; but, as yet, the reputation of Castillero was untouched. No one had ever suggested a doubt concerning the genuineness of his documents. His honor knew no stain. Edmund Randolph, since deceased but at that time private counsel of the Fossat claimants, was now (1857) introduced as a nominal advocate for the Government. Having assumed control of the opposition he, at once, put in issue the verity of every thing alleged on behalf of Castillero. He denied every asserted act *in pais* and every record or other paper produced to support the claim. From this point, fraud, forgery, ante-dating,—indeed the whole circle of imputation, loudly promulgated by counsel, though supported by no scrap or shadow of any thing which common sense could recognize as evidence,—has rung in our ears, filled the papers, and formed the staple of the contention. This new line of procedure has its inception in the record at page 165, or perhaps 252. Its date is the summer of 1857. Thenceforth, the opposition to Cas-

tillero's title wore an attitude as contentious, and maintained a course of forensic practice as rigorously disputatious as has ever been exhibited by any private litigant, or been permitted in a Court of Justice. The stream of contention rolled onward and abroad, in all conceivable directions, until, at the end of 2652 additional pages of testimony, its power of expansion was at last exhausted. The practice pursued would be amusing, but for the time and money lost in contending with it, the temporary doubts excited for the moment by some single detached portion of the testimony it elicited, and its offensiveness to honor and delicacy. Permanent mischief it could never do in any tribunal that was animated by a sense of justice and capable of distinguishing between right and wrong.

The Alcalde's act of juridical possession was first assailed. The original documents were brought in again by the government counsel, from the Recorder's Office, for critical scrutiny. Witnesses were examined as to every handwriting in them, as to the blots or accidental ink-marks upon them, as to the water-marks of the paper on which they were written, and as to the manner in which the several sheets of paper were attached. Transc., pp. 253, 254, 673 to 675. But this display was altogether nude and empty. Nothing resulted from the scrutiny or has ever been claimed as a fruit of it. Surmises of forgery and ante-dating were put forth upon the appearance of every discrepancy, however slight and palpably accidental, between any of the numerous copies which had been made from time to time. And every similar incident was, in like manner, harped upon. These crude imaginations formed the basis of all the cavils concerning this part of the claimant's proof. We have displayed their insignificance with appropriate minuteness of detail in our printed Claimant's Brief, pp. 42 to 98. We rely upon that statement. It will appear to be faultless, unless precision be an offence, or treating the work as necessary can be deemed a want of courtesy to this Court.

Next the Mexican Documents were alleged to be posterior fabrications. The mode adopted to support this allegation was characteristic.

The most conspicuous witness for the Government is one James A. Forbes. He had resided near the mine for about seventeen years previously to Castillero's discovery. He was neither a kinsman nor connection of Alexander Forbes, of Tepic, who afterwards became a principal owner of the mine, and a leading participant in working it. James A. Forbes took a small interest in it at an early period; and he was, for a time, employed as superintendent. This employment brought him into correspondence with Alexander Forbes and the firm of Barron, Forbes & Co., merchants at Tepic, who had control of the mining operations. Prior to the summer of 1857, when Mr. Randolph thus set about drawing in doubt the fairness of Castillero's title, this James A. Forbes had become a bankrupt in character and fortune. On the trial ten witnesses impeached him as unworthy of credit; and not one witness could be found to hazard a word in his favor. Bolton, Barron & Co., of San Francisco, the agents of the New Almaden Company, had refused to lend him money; he was, therefore, on ill terms with them. Laurencel, owner of half the Fossat claim, and the client of Mr. Randolph, gave this desperate man $10,000 for the use of certain letters which he had received from his employers, and certain alleged copies of his own letters to them. This correspondence was to be used only in exciting apprehension and inducing a compromise. James A. Forbes expressly stipulated with Laurencel that he should not be called as a witness, and that his letters should not be produced in Court as evidence. They were according shown to the agent of the New Almaden Company. He treated them with contempt, and disdainfully spurned the attempt at intimidation. Laurencel then produced the papers as evidence; and, in consideration of an additional $10,000, James A. Forbes came into Court and testified to their genuineness.

A paper, purporting to be a copy of a letter from Alexander Forbes to this James A. Forbes, dated March 28th, 1848, was produced by James A. Forbes, more than half a year subsequently to his first examination. The claimant insists that this was itself a forgery. The whole story concerning it is a singular specimen of plagiarism in perjury. It is incredible in itself; and it

reproduces, as if in a moral photograph, all the features of a fable, sworn to a few years previously, on a somewhat famous trial at Cooperstown, in central New York. There is reason to believe that some actors in that very case have an agency in this. One Eldridge, who appears on the record as Laurencel's partner, owning the other half of the Fossat Ranch, came from that very part of New York. (The argument to this point is omitted. The counsel for the Government did not urge that this paper was genuine; nor did the Court, in its opinion, rely upon it.)

Aside from that palpably fabricated paper, the purport of the alleged correspondence produced by James A. Forbes may be thus summed up:

First. The same identical documentary evidence produced before the Land Commissioners, and then and still relied upon for proof of title in the claimant, existed from the beginning, and no thought or suspicion that any part of it was fraudulent, forged, or ante-dated, had ever entered the mind of any one.

Secondly. On comparing Castillero's documents with his own notions of Mexican law, James A. Forbes formed the opinion that in strictness of legal construction, they were technically defective, precisely in the particulars since urged against them in this case. *Hymann* vs. *Cook*, (2 Denio, 208.)

Thirdly. After the American possession of California, James A. Forbes, pertinaciously, and for a considerable period, urged Alexander Forbes, or Barron, Forbes & Co., to obtain from the Mexican authorities new documents of the same dates, and to the same substantial purport as those already existing, but so worded as to be free from those supposed technical defects or blemishes. He pointed out these defects, and explained them with great particularity.

Fourthly. To the manifest vexation of James A. Forbes, the thing so advised by him was not done. The letters so state, and the documents in the record prove it. These documents are now produced by the claimant, and relied upon by him and his associates as the basis of their title. They exhibit upon their faces all the real or imaginary defects and blemishes mentioned by James A. Forbes, and urged by him as inducements

for their suppression, and for the substitution of ante-dated forgeries. The correspondence thus identifies the title-papers now relied upon by the claimant, and verifies their genuineness, both as to tenor and as to dates. Instead of impeaching the claim, this correspondence conclusively repels the suggestion of any actual forgery or ante-dating. If the correspondence fails to show that these fraudulent suggestions were promptly met by a stern rebuke—if they justify an inference that the seducer's unworthy proposition was for a moment entertained—it would be quite immaterial in point of law. *U. S.* vs. *West's heirs*, (22 How., 318.) It should not be overlooked, however, that prudence and the desire "to conciliate a troublesome person" may have dictated the style of reply. Transc. p. 398. And it is entirely impossible to conclude from these letters, either alone or coupled with any other proof in the record, that to any extent, or in any degree a fraud, an ante-dating, or a forgery, was actually perpetrated. In common fairness, the design should not be imputed to any one save the vile instrument of our opponents, James A. Forbes. At least one of the alleged copies first produced by James A. Forbes was a manifest fabrication It is dated October 28th, 1849. Transc. p. 392. The claimant subsequently produced the true original letter of that date. Transc. pp. 844, 846. But the summary now given is accurate, whether this false pretended copy be received into the series or rejected. And it results that there is absolutely no evidence of any sort in this record, impeaching any of the claimant's documents, or throwing the slightest doubt upon any of his allegations. Every one of those allegations is sustained by testimony altogether free from doubt, and so abundant in quantity that it might well be censured as excessive.

Every witness produced for the claimant, who gave testimony concerning any document or paper which such witness wrote or signed, or of which he had any cotemporary knowledge, testified, in effect, that to the best of his knowledge, information, and belief the same was not ante-dated, but was really and truly made according to its purport. No witness produced for the Government testified otherwise except one. This was Benito

Diaz. Transc. p. 676. This man was the copyist of a single very unimportant paper. Indeed it was wholly useless. Closely scrutinized, his obscure testimony, if taken for truth, gives but the very faintest support to the charge of ante-dating. But, on his own showing, he is an habitual prevaricator. His well-known worthlessness is certified in the record. Transc. p. 3477.

Not a single witness produced for the claim is in the slightest degree impeached. On the other hand, but three witnesses were called by its opponents on any point connected with the merits; that is to say, James Alexander Forbes, Robert Birnie and Benito Diaz. Every one of these men was shown to be utterly unworthy of credit. If the fabricated paper of March 28, 1848, had been abandoned at an earlier period, the impeachment of James A. Forbes and Birnie would have been an act of wanton cruelty. In all other respects, their testimony tended to verify the claim.

Judges McAllister and Hoffman separately examined the charges of forgery and ante-dating. Their opinions show that the task was performed with great care and with close attention to the most trifling minutiæ. Indeed, for the purposes of their scrutiny, they seem to have improved upon every imaginary scruple touching the verity of the claimant's proofs. They elevated to the dignity of a substantial charge every hint of a possible doubt, yet they concurred in rejecting, as wholly unfounded, all these charges, scruples and hints.

The impediments encountered by the claimant in producing testimony should not be passed unnoticed.

Through some inadvertence the Act of Congress made no provision for issuing a commission; and the Mexican Government does not permit its great seal to be used for the authentication of copies from its public archives. The law officers of the United States, availing themselves of these circumstances, successfully opposed the claimant's prayer for a commission. They then opposed, and, by their influence, defeated an appeal made to Congress for an amendment of the Act in this respect. Though the claimant offered to pay all the expense, they declined to employ an agent or agents to visit Mexico, there to examine the archives and investigate the facts. They also pro-

cured an order from the Department of State, forbidding our diplomatic and consular representatives in Mexico even to take *ex parte* depositions for the claimant under the general law allowing such proceedings as a common privilege. Every means that the most illiberal policy could devise or that could be dictated by a total blindness to common justice, was put in force to embarrass and defeat the claimant's efforts to examine witnesses residing in that country and to obtain documentary evidence from foreign public archives. These impediments did not avail to suppress all means of vindicating the claimant's integrity. Nine witnesses, who, as officers of the Republic, had officiated in the various stages of the transactions in question at the city of Mexico, were brought to San Francisco and there examined and cross-examined. By their testimony the Mexican archives were directly and fully verified. Among these witnesses were two ministers of State. One of them had been a public officer in various stations for thirty years. He had been twice Prime Minister, and for years Minister resident near the Governments of Great Britain and the United States. They were both men of the highest respectability. Two members of the *Junta*, or National Mining Board, were produced and also several clerks in the public departments. The National Archives were searched, and copious extracts were taken from them and exhibited in proof. These extracts contained not only the evidence of Castillero's proceedings in the city of Mexico and the action of the Executive thereon, but also a multitude of extrinsic transactions, with their dates and the names of numerous actors therein. The most perfect means of testing their verity were thus afforded; indeed, it seems idle to speak on this subject. The evidence is all in one direction; it is overwhelming in quantity and unexceptionable in quality. It is wholly uncontradicted and wholly unimpeached.

It only remains to inquire whether the facts, as alleged by the claimant, create a title legal or equitable under the laws and usages of Mexico. By the Spanish laws, which were adopted in the Mexican Republic, and were in full force when the United States acquired California, mines did not pass under agricultural

or other ordinary grants. By a general grant or concession they were assigned, in absolute property, to any person who would discover and work them. 1 Heathfield's Gamboa, pp. 136–7–8; Ord. of 1783, tit. 5; tit. 6, art. 14, Halleck's Collection, p. 222, 228. See more ancient laws: Halleck's Collection, pp. 6 to 15, 17 to 61, 69 to 123; Law of Mexican Congress, Oct. 7, 1823, Halleck's Collection, p. 403, 404. The ancient ordinances prescribe certain forms. The discoverer is directed to make a written statement of the discovery to a local tribunal; that is to say, the mining deputation of the *territorio.* This paper is to be returned to the party for his protection, after the deputation has noted in its book of registry the time of its presentation. *Within* ninety days thereafter, the vein is to be opened and a pit formed. One of the mining deputation, that is, one of the Judges of the Court, is then personally to visit it; and, says the ordinance, "possession shall *immediately* be given, measuring to [the discoverer] his *pertenencias,*" causing him to mark his boundaries by stakes, and giving him a copy of the proceedings. Provision is made for affixing notices; and if, within the ninety days, any one should present a better claim, a summary hearing is to be had, and the mine adjudged to him. Ord. 1783, tit. 6, Arts. 4, 5. Halleck, p. 224. These forms were substantially observed with one exception. The *pertenencias* were not measured; and, of course, no stakes were set up. This omission was quite immaterial. The *pertenencia* is an easily ascertainable space of land, measured upon the surface. The ordinance gives the rule of admeasurement in the most precise terms. Ord. 1783, tit. 8, Halleck's Coll., p. 235. The number of *pertenencias* to which Castillero was entitled, was in like manner ascertainable; it was seven. *Id certum est quod certum reddi potest.* Ord. of 1783, tit. 6, Art. 1; tit. 11, art. 2, Halleck's Coll., pp. 223, 252.

It is quite clear that this mere piece of surveying might be deferred without serious ill consequence to the discoverer until the interest of other persons should induce them to quicken the miner. The Ordinance of 1584, arts. 22 to 31, Halleck's Coll., p. 78, was never repealed. Its 24th article gave a summary process for compelling any discoverer who should neglect that

precaution, to set up his stakes. Halleck's Collection, p. 80; Heathfield's Gamboa, p. 297. And the Ordinance of 1783, expressly provides, that if a miner have no neighbors, (*i. e.* adjacent miners,) or can do it without injury to them, he may change the boundaries of his *pertenencias* at any time after they have been measured off to him, and may alter the location of his stakes accordingly. Tit. 8, art. 11, Halleck's Collection, p. 236. This mine was in an uninhabited, mountainous region, far distant from neighbors of any kind. Nearly all the Mexican grants which have been allowed in this Court were, as in our common law talk we express it, merely inchoate for want of a survey and for the omission to obtain juridical possession. Our Courts readily supply this merely formal defect. It is far easier to measure to the New Almaden Company their seven *pertenencias* than to locate most of the agricultural grants which this Court has confirmed. Indeed, it is the simplest and easiest operation in surveying that can be imagined.

Surely the bookbinder's argument, that the Alcalde's stitched record is not a *book*, will not avail. Besides, it is an universal rule, that omissions by a public officer in the mode of complying with forms prescribed to him as his duty, are not permitted to affect the party.

The jurisdiction of the Alcalde is unquestionable.

I. There never was a mining deputation in California; and, by the common law of Spain and Mexico, the judicial powers of all special jurisdictions, in their default or non-existence, devolve upon the ordinary tribunals. Salgado's Retencion de Bulas, Part 2, ch. 12, No. 53, and onward; Agustin Barbsa's Commentario, ch. 5; Castillo's Controversias, tom. 6, ch. 146; Pena y Pena's Practica Forense Mexicana, tom. 2, pp. 53, 371, 421.

It is proven by several uncontradicted witnesses, that throughout the Republic of Mexico the practice has long conformed to this rule. In States, Departments, or Territories, which had no established mining tribunals located within their limits, registries and denouncements of mines were always made before the Judges of first instance or before the Alcaldes acting as such. Transc., pp. 29, 30, 133, 135 to 140.

The only judicial officers in California were the Alcaldes or Justices of the Peace, and by a law of March 2, 1848, it is directed that in California, "justice be punctually and fully administered in the first instance by Judges of that grade should they exist thei r by the Alcaldes" or Justices of the Peace. See Observador Judicial of 1848, pp. 230, 231.

II. By the Ordinance of 1783, tit. 6, art. 4, Halleck's Coll., p. 224, the proceedings are to be taken before the Mining Deputation of the "*territorio* or the one nearest if there should be none there." And it is contended, that Castillero should have gone to the nearest of the far off Mexican States in which a mining deputation could be found. This is quite a frivolous exception. The whole frame of the ordinance shows that the word *territorio*, in this place, is equivalent to city, town, or village, in our phraseology. It means a small mining district, town, or place. Within the time prescribed by the law itself, it was utterly impossible to have gone to the distant State to which such a construction would have directed Castillero. Neither could the judges of such remote tribunal perform *any* of the duties enjoined as to giving notice, hearing objections, visiting the mine, or giving possession. Ord. of 1783, tit. 6, arts. 4, 5. See also, titles 1, 2 and 3, Halleck's Coll., 224, 193 to 220.

III. The fact of a meritorious discovery vested Castillero with a perfect and unimpeachable title in equity, independently of forms; consequently his claim was binding upon the Mexican government in honor and conscience. Besides, he made a *bona fide* effort to comply with all the prescribed regulations. And if there be any defect in this respect, it must be admitted that his acts were the closest approximation to exact and literal com pliance that was possible under existing circumstances. When these forms were prescribed their main object, and indeed it would seem that their sole object, was to secure the collection of a tax or royalty upon mineral production which was then reserved to the crown. Heathfield's Gamboa, p. 143. At that time quicksilver was a royal monopoly. But in 1811, that monopoly was surrendered; and in 1828, as has already been shown, all taxes and imposts on that branch of mining were abolished

In their stead, premiums and rewards, payable from the public treasury to stimulate its production, were substituted. Decree of Cortes, January 26, 1811, Halleck's Collection, pp. 381 to 385; Act of Mexican Congress, Oct. 7, 1828; Ib. 403, 404; Decree of Dec. 2, 1842, art. 10, ib. 487; Decree of May 24, 1843, ib. 452, 453. Since quicksilver mines were placed on this favored footing, these forms had no object except benefit to the discoverer himself. And when, as in this case, there were no neighboring mines, they became almost if not absolutely unimportant.

IV. The action of the Supreme Government obviated the defects, if any there were, in the Alcalde's proceedings. It confirmed Castillero's title to the mine itself and was a direct and effectual grant to Castillero of two square leagues, his mine being the centre thereof. It may be admitted that the latter concession could not take effect on any lands except such as may ultimately appear to have then been ungranted portions of the public domain. The Government had no power or intention to give lands which had been previously granted to others, nor does the New Almaden Company claim any such lands.

1. During Spanish rule the Viceroy had power to extend special and unusual privileges to meritorious mining enterprizes, by enlargement of the *pertenencias* and otherwise. Ord. of 1783, tit. 6, art. 15 and 17; Ib., tit. 11, art. 1; Halleck's collection, pp. 229, 252; Lare's Derecho Administrativo, pp. 91, 93. Since Mexican independence, this power has been vested in the President.

2. As to grants of land, the rule was the same. In testing their validity, this Court holds that the colonization law of August, 18th, 1824, is the guide; 20 How., 68; 1 Black, 553. The Californias were a territory, and the 16th section of that law placed the public lands in the territories, at the disposition of the executive.

Acting under this authority thus conferred on him, the President of Mexico, by the regulations of November 21st, 1828, "dictated" to the Governors of the Territories, as his subordinate agents, "some general rules" for their government in granting lands. They were to observe certain formalities

and their final action was subject to the approval of the local legislative assembly. These regulations reserved an appeal to the President himself in case of disagreement between the Governor and the local legislature. In all cases the ultimate power was with the President. It is objected that the grant to Castillero was not made in the manner prescribed by these regulations. That is true; but it is quite immaterial. The regulations were "dictated" *by* the President to control others, his own subordinates. They did not bind him. In a case precisely analogous, this Court said: "It is apparent that these general regulations were intended for the government of subordinate officers, not to control and limit the power of the person from whose will they emanated;" *Delassus* vs. *U. S.*, (9th Peters, 135.) Besides, at the time of this ratification and grant, President Paredes exercised all the powers of government. There was no written constitution; there was no legislative body in being, nor was there any existing law whereby a legislature could thereafter come into being. For this purpose, and for administering the government in the interim, there could be no resort, except to the extraordinary powers then exercised by Paredes. We do not claim for him powers absolutely despotic, in the extreme sense of the term. But it seems clear that all acts of his administration which were performed in good faith, were just and reasonable in themselves, and were conformable to the established policy of the Republic, should be held valid as between the government and private individuals, whether the precise methods of procedure prescribed by previous laws were observed or not.

Castillero, through the mining *Junta*, stated to the President his discovery and that the local authorities had given him possession of the mine with at least twice as much surface as that inferior tribunal had authority to give. As the *Junta* understood and construed the Alcalde's act, fifteen *pertenencias* had been granted. Castillero represented "to the Supreme Government the *necessity* of its approving the possession" so given, and "the advantage of there being granted to him, as a colonist, two square leagues upon the land of his mining posses-

sion, with the object of enabling him to use the wood for his burnings;" Transc. p. 1802. The President's answer was given upon the margin of the application, in these words: "May 20, 1846. Granted in the terms which are proposed; and with respect to the land, let the corresponding order issue to the Minister of Relations for the proper measures of his office, *with the understanding that the Supreme Government accedes to the petition.*" Transc. p. 1798. Three days afterwards that minister delivered to Castillero a dispatch addressed to the Governor of Californias, transcribing the decision of the president on "the petition of Mr. Castillero, to which his Excellency, the President, has been pleased to accede, that there should be granted to him as a colonist two square leagues of land upon the land of his mining possession, so that in accordance with what is provided in the laws and dispositions upon the subject of colonization, you (the Governor) may place Mr. Castillero in possession of the two leagues referred to." Transc. pp. 2200, and 1807.

Writing the word "granted" on the foot or margin of a petition, was the common method of making an absolute cession of lands in Spanish America; and this Court has often decided, that, in point of form, it is quite sufficient. "It must be referred to everything referred to in the petition." *Smith* vs. *U. S.* (10 Peters, 332; 23 How., 498; 18 How., 563.)

The mining possession was ratified unequivocally. Among the things sanctioned was a loan of money to Castillero, to be repaid in quicksilver from this mine, and to be secured by a mortgage on the mine. The two leagues of land were conceded by a grant *in præsenti*. The words cannot be otherwise construed. It has been said that it was merely a reference of the petition to the Governor, to the end that he should act upon it conformably to the regulations of 1828. This is not according to the words; and it is quite irrational. When the President says, "I grant his petition," can he mean I give him leave to petition my subordinate? That was the common right of everybody. But the notion is baseless. The regulations were not applicable. They refer exclusively to a different class

of applicants; that is to say, those "who may ask for" lands "for the purpose of cultivating or inhabiting them." Hardly one of their details, is, in any degree, adapted to this transaction, or capable of being moulded to fit it. See these regulations. They are to be found in Ex. Doc. of 31st Congress, 1st Sess., No. 18, pp. 38 to 40. To say that the Governor was directed to proceed according to the *regulations* would be absolutely absurd. It was impossible to do so. They did not apply. The 16th section of the law of 1824 was alone applicable; it authorized the President to grant lands in the *territories.* The governor had only to give juridical possession which was the civil law livery of seisin. This was a mere formality; and he was the proper local officer to give it, or to cause it to be given. The omission of such forms has always been disregarded by this Court. 17 How., 563; 18 How., 6, 7, 563, 565; 19 How., 364; 23 How., 497, 318. The island case is directly in point. "Emanating as the dispatch did, from the supreme power of the Nation, it operated to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the department." *U. S.* vs. *Castillero,* (23 How., 469.)

Mr. Black, of Pennsylvania, and *Mr. B. R. Curtis,* of Massachusetts, for the United States.

In the bulk of the record, and the magnitude of the interests at stake, this is probably the heaviest case ever heard before a judicial tribunal. Firmly believing it to be illegal and fraudulent, the United States have always met the claim with uncompromising hostility. From first to last they have shown it nothing but the edge of the naked knife.

But the character of this opposition is complained of as being unfair. Specific accusations are made, intended and well calculated to produce the impression that the claimants have been hardly, if not wrongly dealt with. "Now mark how a plain tale will put that down."

The claimants were unwilling to produce their witnesses at

San Francisco, as the law required. They desired to examine them in Mexico, where the United States could not follow them. The District Court refused them a commission for that purpose. They appealed to Congress for a change in the law, and Congress refused to make any change. Thereupon they asked the Attorney-General to consent, in violation of the law as expounded by the Court, and adhered to by Congress, that depositions should be taken in Mexico. This he declined to do, because (among many other reasons,) there was no fund upon which he could draw for the expenses of counsel, to represent the United States in a foreign country. Then it was that they proposed—yes, openly and plainly and boldly proposed—to pay all expenses themselves; *to take the counsel of both sides under their own pay.* This proposal was of course rejected with the indignation and scorn it deserved. And the claimants were notified that from that time forth they must keep their distance.

But th. did not end the struggle they made to avoid producing their witnesses where the law required them to be, and where the proper officer of the government could be present to cross-examine. They gave notice that depositions would be taken in Mexico any how. Our consul at the City of Mexico and the Minister Plenipotentiary were to be used for doing that which the judiciary, the legislature, and the executive, had declared to be unlawful and improper. The Secretary of State instructed our diplomatic and consular officers not to prostitute their functions by allowing themselves to be used in any such way.

What was meant by this effort in the face of all law to get Mexican depositions which they must have known could not be read,—for the Court had previously so decided,—remains a mystery yet. We know the case was not made out by the evidence which was afterwards legally taken; but we do not know what they might have got Mexican witnesses to testify in ex parte affidavits. We know from the record that a title dated previous to the war was asserted and sworn to by them, or some of their agents,—and that title is now wholly abandoned as a thing which never existed.—but it is not certain

that somebody else might not have sworn to it also, if the testimony had been taken where no punishment could be inflicted upon perjury, and no cross-examination could expose its character. They may have the admission as frankly as they wish it, that we never trusted them; and this want of confidence is abundantly justified by the evidence on record. The men who had avowed in their own letters to one another, their intention to forge a title for the property in contest, and to retain possession of it "at all costs, and at every hazard," are not the persons who can excite sympathy, or place themselves in the interesting predicament of injured and ill-used gentlemen, by showing that the government doubted their integrity, and refused them unlawful opportunities to consummate the fraud they were known to be contemplating.

The claimants assert two titles:—1. The first is called their mining title, which on its face is a grant to Don Andres Castillero, by Antonio Maria Pico, Alcalde of San Jose, dated December 30, 1845, for three thousand varas in every direction from the mouth of the mine. This would make a square measuring six thousand varas on each of its sides—about a league and a quarter of land, with the mine in the centre. 2. The other title paper is a *dispatch* dated at the City of Mexico, 20th May, 1846, signed by Castillo y Llanzas, Minister of Relations, addressed to the Governor of California, and requesting him to put Don Andres Castillero in possession of two leagues on his mining possession, in conformity with the colonization laws. The claimants insist that this is a grant for two leagues with the mouth of the mine in the centre of it also; that is to say, a grant of the same league and a quarter given by the Alcalde in December, and three-quarters of a league more.

This enormous claim is founded upon these two papers alone. The bloated body of the claimants' case is made up of evidence, oral and written, which is meant to show that these papers are genuine, and that a right to the land in question passed into Castillero when they were made, and by virtue of their legal operation.

The United States object to the Llanzas dispatch that it is

without show or semblance of legal validity, as a grant of land, because—

1. The Political Chief of the Territory alone is authorized by the Mexican law to divide the public domain among colonists. The decree of 1824 and the regulations of 1828, limit the power and control its exercise.

2. If the Supreme Government has the power it must be exercised by its responsible head. The Minister of Relations cannot do it of his own will; and there is no evidence here that the President of the Republic authorized his act.

3. This dispatch of the minister does not purport to be a grant. It is a simple request that the political chief will execute the colonization laws in such manner that Castillero may acquire a title in accordance with those laws to two leagues of land not designated or described. The dispatch itself, by every rational construction of it, required the Governor to receive a petition and a map designating the land; to inquire what public interests and what private rights would be affected by the grant; and to decide, after a full hearing of all concerned, whether a title to Castillero could be properly made or not. Castillero took the paper and the Governor never saw it. If it had been presented to the Governor he could not, and the presumption must be, that he would not, have made a title to this land, because the first step of the investigation which the law bound him to make would have shown that it had been granted long before to other parties.

4. If the Governor had actually made a grant for the land now claimed under the dispatch, it would still be a conclusive and unanswerable objection to it, that it was at that time private property. The fact is proved by the record and not denied by any body, that Larios and Berreyesa had titles, under which they were in possession for many years. Could the Government or any officer of the Government take away their rights and vest them in Castillero? No; even a despot cannot do that without breaking up the foundations of society. It is the crime for which Ahab's family was doomed to be extinguished and his wife eaten by the dogs. It is not less an offence against Mexican

than it is against American law. The proof is conclusive, that Castillero knew this to be private property. If he concealed the fact from the officer, then he was trying to cheat the Government and his neighbor both. If he communicated it, and the officer attempted to make a title notwithstanding, then the two were engaged in a base conspiracy to cheat. Either way it is as corrupt in morals and as void in law as the nakedest forgery which he could have made with his own hand.

5. But if we concede that the Minister of Relations had power to make a grant of these two leagues, and that he did exercise the power by issuing this dispatch; admitting, in short, that the paper is a valid and good title on its face, still the fraud committed by Castillero, in his written representations to the Government, would render it utterly null and void. In his memorial to the *Junta de Mineria* he describes the mine as being in the Mission of Santa Clara, which is public land. In truth, it was on private property, near the line between Berreyesa's ranch and that of Larios, fifteen miles away from the Mission lands. And he cannot deny that he knew this very well, for his other title, dated four months earlier, describes the mine as being on the ranch of Berreyesa.

6. There is another fatal objection to this title paper. It is dated 20th of May, 1846, *after the declaration of war* by the United States against Mexico, which event took place on the 13th of May. When the treaty of peace was under negotiation, Mr. Trist, the American Commissioner, proposed to insert a provision that all titles made subsequent to 13th of May, 1846, should be void. The Mexican Commissioners declared it to be unnecessary, and assured him in the most solemn manner, and after more than one examination of the record, that *no titles* for land in California had been made *after that date.* On this basis the treaty was agreed to, with that declaration repeated in the tenth article; and when the ratifications were exchanged, Messrs. Clifford and Sevier assured the Mexican Secretary for Foreign Affairs, that all titles dated *before* the 13th of May would be protected. On these facts we maintain that the validity of the claimant's title was tried and determined and pronounced by

the Mexican Government itself to be no title at all. From the treaty, the dispatches of Mr. Trist, the protocol appended, and the correspondence of Mr. Clifford, while Minister, no other inference can possibly be made than one of these two: either this dispatch of Lanzas was not then on record, and is therefore a subsequent fabrication; or else it was adjudged by all the chief officers of the Supreme Government to be totally destitute of that legal validity which would bind either Mexico or the United States to regard it as a title to land.

7. This title is not only repudiated by Mexico, but the parties who claim under it have themselves denied its value as a legal title under circumstances which give that denial the greatest weight. Their correspondence concerning it is on this record. Their own letters admit that they cannot hold the land under it; and they were so entirely sure of this that they agreed to procure another and a different title to be forged, and use that forgery in place of this. Common charity will require us to suppose that these men would not have determined to commit a great offence against God and man without perceiving the clearest necessity for it. We cannot suppose that they were impelled by the mere love of crime for its own sake.

The other branch of the case—that which the claimants call their denouncement or mining title—is perhaps more important; certainly some parts of it are less simple and less easily disposed of.

It is admitted that a mining right may be acquired under the laws of Spain and Spanish America by one man upon the lands of another; but he acquires no title thereby to the land itself. The mines are public property and the Sovereign can exercise the right of eminent domain by taking so much private property for that public use as may be necessary to work them, providing that just compensation be made to the owner. The laws of Spain and Mexico embody on this subject precisely the principles of our own State and Federal Constitutions. The delegation to an individual of this right of eminent domain—*dominio alto*—so that he may work the public mines, constitutes the substance of a Spanish mining title But a miner has no

more title to the *land* under which the mineral lies, nor to the mineral itself, than a turnpike company in this country has to the soil on which its road is laid. (Vide. Gamboa, chap. 2.) We submit, therefore, that the Land Commission had no jurisdiction of this case, since its power is limited to the investigation of titles to land only.

But we put this point to the Court merely because we cannot be faithful to our convictions without doing so. We shall be glad to find it decided the other way, for that is not our defence against this claim. We oppose it for these two substantial and powerful reasons: 1. That it is not on its face a mining title; and, 2. That the evidence shows it to be spurious and fabricated.

The assertion that this is not a mining title according to the law of Mexico, does not mean merely that it is informal, irregular, or defective in some particulars. It is unlike the title required by the plainly written statute in form and substance; in every feature of its form, and in all parts of its substance; all through, from beginning to end, it not only disobeys but insults the law. It is a contradiction and a violation of the ordinance in the aggregate and in the detail; in its general aspect and in all its lineaments; in the sum total and in every item by which the sum total is made up Let us see what the law is, and then compare this pretended title with its provisions.

Three distinguished counsellors engaged in this cause for the claimants have written books on Spanish and Mexican Mining law—Messrs. Rockwell, Halleck and Benjamin. We make no accusation against them of wilful bad faith, but we deny their authority on the points disputed here, and we do not happen to need their help. Heathfield has given us a faithful version of Gamboa's great work, and Thompson has translated the ordinances in a manner never complained of. Both those gentlemen were eminent English lawyers and accomplished scholars in the Spanish language. Their books were printed for public information, and were not suggested by the wants of any particular case. He who studies this subject impartially, with these lights to guide him, will hardly go wrong. But it may aid the investigation to look at the legislation of other countries. Mines are

regarded as public property and worked under public authority in nearly all the countries of continental Europe. The general principles of every code are the same as those on which the Spanish system is founded. There is no subject on which the laws of so many governments are so nearly alike. We refer the Court to *Peyrrett—Lallier—Legislation des Mines; Blavier—Jurisprudence des Mines en Allemagne; Delabecque—Legislation des Mines, en France et Belgique.* The last book, besides full commentaries on the mining codes of France and Belgium contains an account of the laws on the same subject established in *Bohemia,* (38); *Saxony,* (48); *Austria,* (47); *Hungary,* (45); *Prussia,* (62); *Hanover,* (56); *Sweden,* (104.) The *Repertoire des Mines* furnishes the Ordinances of *Sardinia* in Italian and French.

If there be any one proposition more clearly undeniable than another, it is this: That no man can or ever could acquire a mining title in Mexico without a *registry* by the proper public authorities. Such is the high aud unquestioned authority of Gamboa, who devotes Chap. V., of his Commentaries to the task of proving that registry is the very basis and foundation of the miner's right, and that it would be unsafe, unwise and unjust to dispense with it in any case. The ordinances, themselves, command it in express and unquivocal words. It is a principle of public law that every act of a public officer under which a private right is claimed must be made matter of record. Every mining code in the world so far as we know requires it. All writers, great and small, concur in the opinion that there can be no pretence of title without it.

What is a registry? That is easily answered. We need not resort to translators. The word is the same in Spanish and in English. Both derive it from the Latin—*liber rerum gestarum* —which the Roman lawyers contracted into *registrum.* To register a thing is to write it in a book; and this, Gamboa says, is especially required in the case of a mining title to preserve it from the danger of simulation, defacement, fraud and loss to which separate papers would be exposed.

Here no registry is proved or even alleged. It follows irresis-

tibly that the claimants have no color of title. That ought to be an end of the case, and it would be the end of any case except this.

But they produce three or four loose papers which they call "*the Espediente of a Denouncement.*" The very use of this phrase shows that they have no title; for a title approximating in form or substance to that which the law requires can have no *denouncement* nor no *espediente* about it.

A denouncement, *denuncia*, is the delation or accusation which one who desires to rehabilitate an old mine makes of the default which the former owner has committed and by which the previous title has been lost. The ordinances employ it in this sense; the legislators and authors use it so; it is so defined by Escriche, the standard lexicographer of the Spanish law. It has no proper application to any thing connected with the title of a new mine. As signifying the representation of a discoveror, it has been introduced into California parlance for the benefit of this case, and it is countenanced by a note to Mr. Rockwell's book; but such use of it is against all authority.

The word *espediente* has long been familiar here. It is the junction of all the separate papers made in the course of any one proceeding, and which remains in the office at the close of it. (*See Escriche in voc.*) But in a mining title there are no separate papers. The first representation with which the miner presents himself before the Deputation is returned to him after its substance is transferred to the registry. The registry, pure and simple, constitutes not only a necessary part but the whole of the title, the beginning, middle and end of it. No one can read the ordinance and fail to see that the assertion of an espediente contradicts the assertion of a legal title.

But let that pass. What did Castillero do to give him or his grantees a decent pretext for claiming the mine? He came to California in the autumn of 1845, and went to New Helvetia. He left Sutter's fort on the 12th of November for Santa Clara. From the latter place on the 22d of November, he addressed a letter to the Alcalde of San José, declaring that he had discovered a vein of silver and gold (which was false) on the

Rancho of Berreyesa, (but he does not say where,) and requesting that notices be put up which never were put up. On the 1st of December, at Santa Clara, he detected the presence of quicksilver in the ore as testified by Lease, and on the next day wrote again to the Alcalde that *on opening* the mine he had taken out *besides silver, with a ley of gold, liquid quicksilver* in the presence of several bystanders. All this was false, he had not opened the mine and there was neither gold, silver nor liquid quicksilver there. Soon afterwards he got one Chard to reduce some very small quantities of the ore by heating it in gun barrels. While this was going on the Alcalde and some other persons came to the mine, and they swear that possession was given of it that day. But Chard, the only witness free from the suspicion of being *professional*, swears that Castillero was not there to receive the possession. Castillero left for Mexico in March, and never returned. Chard worked on a while with gun barrels and afterwards with trypots, but in August he suddenly dropped the business and went away salivated. It is not pretended that any more work was done until the spring afterwards, when Walkinshaw and Alden came up, and it is not *proved* that *they* did any. But Alexander Forbes came up from Tepic in November, 1847, discovered the mine, which, until then had been undiscovered, ascertained the extent and direction of the vein and the richness of the ore, and in January, 1848, he began to work it, and simultaneously to fabricate titles for it with false certificates.

These are the *res gestæ* as proved, not by the *liber rerum gestarum*, but by loose papers and oral testimony. Taken collectively or separately, is there any thing in them (the documents or the facts) which looks like a mining title? Analyse the Ordinance of 1783 from which this title derives its life, if it has life, and compare its provisions with the acts of Castillero and Pico. The requirements of that law are plainly these:

"1. The grantee of the right must have *discovered* the mine.

"2. He must *present himself* before the *mining deputation* of the territory or district, or if there be none there, before the *nearest* one.

"3. He must present to the deputation a written statement,

exhibiting *his own name* and the names of *his partners*, their residence, profession, &c.

"4. The statement must also contain a description of *the place where the mine is*, embracing the most *particular* and *distinguishing features* of the *sitio*, (spot,) *sierra*, (mountain,) or *cinta*, (vein.)

"5. All these things shall be *entered on a book of registry*, to be kept by the deputation, and the written *statement* shall be *handed back* with an attestation upon it for the due security of the discoverer.

"6. *Ninety days' notice* shall then be given to the public of the application which the discoverer has made.

"7. Within the ninety days he must *dig a pit* in the vein, one yard and a half in width and ten yards deep.

"8. A *member of the mining deputation* must then *go personally* accompanied by the *secretary, if there be* one—if not, by two assisting witnesses, and by the *mining professor* of the district, *to inspect* the mine.

"9. He must ascertain the *course* and *direction* of the vein, its width, its *inclination* to the horizon, its *hardness*, or *softness*, the *solidity of its sides*, and the *kind of mineral* it contains, and all these things must be carefully noted and *added to the registry*.

"10. The evidence that *possession* was given must also be *inserted in the registry*.

"11. Possession must be accompanied by a *measurement* of his *pertenencia*, and by *fixing stakes* to show the boundaries."

Every one of these provisions was based upon principles of public policy, which experience had proved to be not only sound but necessary, and every one of them was disregarded in the present case. Castillero was not the discoverer of the mine; he knew no more about it than what was known to the Indians for a hundred years before he came there. He did not present himself before the mining deputation of the territory, or take the legal alternative of going to the nearest, but wrote to an officer who had no authority. He furnished no designation or description of the mine, by which it could afterwards be known, nor did he disclose the names of his partners. There was no registry made, nor no notice given to the public; no inspection, nor

no opening to be inspected; no assignment of pertinencias; no measurement or marking of the ground.

Here then, is a title—if it be a title—made in 1845, to a mine that was not discovered until 1848; made by an officer, who had no jurisdiction, to a company that is not named; without designating the subject-matter of the grant by even the vaguest description; without a registry, without notice, without inspection, without survey or stakes. To call this a title according to the laws, usages, and customs of Mexico, may pass in California, where so many curious things are done; but before the supreme tribunal of the Union, it would be absurd to fear it. Knowing it to be impossible that you can pronounce this a title, it is allowable to say, that such a decision, if it were made here, would provoke the loud laugh of the whole world.

It is worth a moment's time to observe how these fatal defects in the title were treated by the Court below. One of the judges passed them over in profound silence, as not thinking it necessary to determine whether the claim was founded on a legal title or not. The other judge examined the documents elaborately, and thoroughly analyzed the ordinances. Of course, he saw that the objections of the United States were well founded in point of fact. But it was his opinion, that Castillero had a *title by discovery*, which was *not forfeited* by his acts in violation of the ordinance, or by his omissions to do what the ordinance required. This, we submit, was in the very teeth of both the fact and the law; of the *plainly-proved fact* that Castillero never discovered the mine, and of the *plainly-written law* that the title of a discoverer is absolutely nothing without a registry and marking of boundaries. It was never asserted that Castillero had forfeited his right: he never had any right which could be forfeited.

It is true, however, that if a title had vested in him *it would have been forfeited.* Neither he nor his alienees ever paid into the public treasury a cent of the share to which it was entitled from the proceeds of the mine. Besides, the mine was never really worked until 1848, more than two years after the date of the pretended title. It is not asserted that any thing at all was done at it, even with gun-barrels or trypots, from August, 1846,

until late in the spring of 1847. Now, it is expressly provided by the ordinance, that if the owner of a mining title shall suspend the working of the mine for four months within the space of one year, his title is absolutely and completely gone; any other person may register it, and the original owner cannot lawfully work it again without getting a new title, by means of a new registry. If, therefore, it were conceded that Castillero got a perfect title, by the act of Pico, in December, 1845, it is nevertheless clear, that when Barron, Forbes & Co. took possession in 1848, they were mere naked trespassers, without color or shadow of right to the property at which they were grasping.

But they say their mining title was confirmed. That is impossible; for a mere nullity is incapable of confirmation. Besides, the mining title was never exhibited to the Supreme Government. Castillero vaguely and falsely referred not to this mine, but to a mine which he had denounced in the Mission of Santa Clara. Neither the President nor any of his ministers knew the situation of the mine, or saw any papers relating to it. Nor did either of them say a word about the title in any official act, order, or decree.

Another objection to the mining title, equally formidable and equally clear, is that the evidence shows it to be spurious, fabricated, and false. Many grounds of strong suspicion may be seen on the face of the papers.

1. The want of a registry can hardly be accounted for without believing that the papers were made after the conquest. Castillero had the ordinances, and knew that a registry was required, and would have had one if he had been getting a title in 1845. But in 1848 it was a difficult thing to make a book and put it among the records.

2. This proceeding appears to have been closed up on the 30th of December, 1845, *thirty-eight days* after the date of Castillero's first representation to the Alcalde. He could not but know that the law required him to wait *ninety days*. The Alcalde knew it, and recites in the "Act of Possession" that the time has expired. There is no fact proved, or suggested, which can account for this illegal and unnecessary haste on the theory

that the papers are genuine. But if they are false, it is easily understood. Antonio Pico must sign, for nobody else would do it, and the last paper must, therefore, be dated when he was still in office. He went out of office December 31, 1845. The "Act of Possession" is dated the day previous. The other papers had to be dated after Castillero came into the country, and this is the reason why the whole proceeding appears on its face to have been crowded into the space of thirty-eight days.

3. The papers are all in the handwriting of different persons, Castanada, Benito Diaz, and Gutierrez. None of them was written by the claimant, by the Alcalde, by the Secretary, or by either of the attesting witnesses. None of the persons who wrote them is called, except Diaz, and he swears that his share of the work was done long after the intended date of the papers. We cannot assert that the character of this witness is perfect, but it is as good as that of Castro by whom he is contradicted.

4. But there is another circumstance here, which is more than a ground of mere suspicion—it is perfectly conclusive. The "writing of partnership," which is part of their espediente, and the sole foundation of title to twelve out of the twenty-four *varas*, describes the mine as a mine of gold, silver, and *quicksilver*, and is dated on the 2d of November, 1845; when it is absolutely certain that no human being had ever thought of such a thing as quicksilver being there. The very moment when the presence of quicksilver was first detected in the ore is ascertained beyond dispute from the evidence produced by the claimants themselves; and they admit here, that no idea of such a thing existed earlier than the last of November or first of December. The counsel not only admit that fact, but they *admit our inference from it that the paper is ante-dated.* Though this conclusion was successfully resisted in the Court below, it would be mere vanity to deny it here. These chronological blunders are the besetting dangers of men who make false papers. They often occur in fabricated titles, and when they do occur, they always furnish the means of most triumphant exposure. Many years ago a Spanish grant of land in Louisiana was discovered to be a forgery by an officer in the Land Department, who

noticed that Bayou *Mason* was referred to in one of the papers, which bore date before the time when that bayou was known by that name. In the case of Lady Ives, a long chain of title-papers, ingeniously fabricated, was totally destroyed, by showing that one of the deeds, dated in the reign of William and Mary, ascribed to the king and queen a style or title which was not adopted until after the date of the deed. It was only at the last term that this Court pronounced the claim of José Castro to be fraudulent, mainly upon the ground, that in the grant Pio Pico was made to call himself *Constitutional Governor*, whereas at the date of the grant he was *First Vocal* and *Governor ad Interim*, and did not become Constitutional Governor for several days afterwards. In none of these cases was the proof of fraudulent ante-dating one whit stronger than it is here; and the proofs which sweep the writing of partnership away carry with them the other papers also; for it is so important a part of the title, and is so connected with all the other papers that they must suffer a common doom.

What evidence have they produced to authenticate their espediente? If it be genuine it was archived at the time it was made; it was deposited among the records of the Alcalde's Court with the superscription of the proper officer on it; it remained there until the time of the conquest; it was then delivered to the authorities of the United States, and has been an American record ever since. If this were its history it would prove itself; for record evidence, if it be truly such, is always simple and conclusive. It would have needed no bolstering by the oaths of the officers who signed it, nor no false certificates from their successors. The claimants could and would have gone to the records at once, in the beginning of the contest, and by merely producing it, would have silenced all denial of its truth. Instead of this they resorted to copies, now known to be false, and did not produce what they alleged to be the original until eleven years from the time of its pretended date. Conscious that it was not a record, they resorted to evidence *in pais* to show the execution of the several papers, and to establish the facts which they set forth. Let us see how they have succeeded

in doing this; and what proof they have given that the papers were either made, or filed and archived, at the time of their date.

Of the two petitions, which are part of the espediente, it is a remarkable fact, that not a scintilla of evidence is given. Even the Alcalde, to whom they are addressed, does not say that he ever saw them. Pico, Noriega, and Suñol testify that they signed the Act of Possession, but not that it was filed or ordered to be filed. It was brought to them ready written by Gutierrez, who took it away again. None of these men swears to any act connected with the paper which might not have been done by a private individual as easily as by an officer, and after the conquest as well as before. Fernandez, the Secretary, says, Guttierrez brought it to him, but he did not file it; he only saw it there, tumbling about among other loose papers. Under the pressure of a strong cross-examination, the truth oozed out of this witness, drop by drop. He admitted at last, that he never read it, did not know it, and had only sworn to its identity because he *imagined* it to be the same. That is the evidence of its being filed among the archives; the imagination of one false witness, too treacherous or too timid to carry out the purpose with which he began.

There is not on the paper the slightest mark that it ever was seen by any Mexican officer before the conquest. But another paper is produced—an inventory signed by Chaboya, second Alcalde for the next year, in which among other documents is mentioned "Acta de Possession de Mina de St^a^ Clara a Don Andres Castillero." This does not speak of the *espediente*, but only of *one paper*, and does not identify even that.

They have introduced another set of facts, which are not evidence, and which it is scarcely possible to speak of with patience. Castillero was one of the most mendacious of human beings. He wrote and spoke every variety of falsehood about the mine, the work done at it, and his right to it. And these false statements of his own are produced at second, third, or fourth hand, as proof of his title—witnesses detailing his words or the words of somebody else, who had heard him speak—letters from himself—letters from others who repeated his state-

ments—newspapers in the City of Mexico—newspapers in the Sandwich Islands, detailing a story which the editor got from Judd, and Judd got from Larkin, and Larkin got from Castillero;—all this is paraded as evidence of title. We deny that the mere repetition of Castillero's falsehoods, by other persons, is any evidence of their truth. Nay, the production of them in Court is a plain palpable badge of fraud. No honest claimant, with an honest title, would think of going to the Sandwich Islands for hearsay evidence to prove it. The experience of this Court may be safely appealed to for that. No case was ever confirmed here that had any thing like this on its record. But every false and dishonest claim comes loaded down with this kind of trash Miserable must be the condition of a country where such testimony is not only brought out and listened to, and debated at the bar, but where grave judges sit gravely on the bench and discuss it in their written opinions. On this side of the Rocky Mountains no justice of the peace would give judgment upon it for the price of a sheep, but in California it is allowed to swing a court from its moorings in a case involving uncounted millions of dollars. It is one of the saddest tales of these sad times, that men's rights should be so trifled with in a court of justice.

The claimants have produced four different espedientes. One of these they allege to be the original from the record of the Alcalde's Court, and to it the evidence already mentioned applies. The other three profess to be copies. But the three copies differ from each other, and each copy differs from the original in material and most important respects. These flat contradictions, apparent on the face of the several titles produced at different times by the claimants, are so numerous that it has been thought best to exhibit them in a kind of tabular form, and therefore a *chart* of them is inserted in the brief of the United States. This enables the Court to see at a glance the decisive evidence that *all of them are false.*

No. 1, the "*Weekes' espediente*" is certified to be a true copy from the original by James Weekes, Alcalde of San José, 20th of January 1848. It was written out by James Alexander Forbes.

one of the claimants, at the instance of Alexander Forbes, another claimant. There was no original in the office. Weekes certainly signed the certificate without seeing any original; and he himself afterwards swore to that fact. James Alexander Forbes, being British vice-consul for California, certified under his official seal, that Weekes' attestation was "worthy of all credit," and then gave back the document to his confederate, Alexander Forbes, who took it to Tepic, where he got the additional certificates of several Mexican officers and the American consul. This false paper, thus falsely certified, was filed in the Land Commission, as the basis of the claimants' title, and the decree of the Land Commission was founded upon that gross imposture. After the cause came into the District Court, it was exploded, and the claimants found it necessary to take new ground.

No. 2, the *Halleck's espediente*, is the one which Captain (now General) Halleck testified in 1857, that he had found among the records of the Alcalde's Court at the Mayor's Office, in January, 1851. This is the original if there be any original. Mr. Halleck does not speak with certainty of its being the same paper but only to the best of his knowledge and belief from the contents and general appearance. But he regards this as the *original denouncement* of the mine, and says he has not, and never had, any reason to believe that it was in Mexico or elsewhere out of its proper place among the archives. General Halleck was mistaken—possibly about the identity of the paper—certainly in the judgment he formed that it was an old record—as the following facts clearly show:

It seems there was an ejectment pending in 1850, between the Berreyesas and the New Almaden Company for the mine and adjacent land. The Court made an order upon the defendants (the present claimants) to produce their title papers, or a copy thereof; Mr. Halleck, their attorney, answered it by an affidavit, declaring that the order could not be complied with; that is to say, they could not produce the original papers, or any copies thereof, though all due diligence had been used, because *the title papers were in Mexico*, and among others particu-

larly specified is this very paper, the *original denouncement* of the mine.

If this affidavit is believed, it puts beyond controversy the fact that this espediente was not among the archives in December, 1850, and proves conclusively that it had not been there a month when General Halleck found it. And who shall dare to deny the truth of the affidavit? Will the claimants attempt to sacrifice upon the altar of the false god they worship the character of a man who has served them so faithfully, by asserting the want of all truth in a statement to which he pledged his oath for their benefit?

The affidavit is true. It avers no falsehood and conceals no mental reservation. General Halleck *did* use due diligence; he looked for the papers in their proper place and did not find them, because they were not there. We deny that he was capable of equivocating about two originals or paltering with the Court in a double sense. Especially do we repel the imputation which the unkind construction of the Court below would fasten upon him, of taking the oath from his employers, and like the lowest professional witness, swearing what they told him to swear, without knowing or caring whether it was true or false.

The supposed contradiction between the affidavit of 1850 and the deposition of 1857, amounts to very little, and that little is easily accounted for by lapse of memory and error of judgment. But there is enough in it to confirm the faith of the Court in the wisdom of the rule which excludes oral evidence altogether as a means of proving title. If General Halleck with his unblemished character and high position is liable to mistakes, what can be the value of such witnesses as Pico, Noriega, and Fernandez? "If the righteous scarcely be saved, where shall the wicked and the ungodly appear?"

But the affidavit is true, and the espediente was therefore a false and simulated record, not merely because General Halleck has so sworn, but also because that oath of his is corroborated by other evidence conclusive and irresistible.

Between the years 1846 and 1851, the title to this mine was in constant dispute. Half a dozen suits were heard and deter-

mined by the local courts, in which Castillero's right was asserted on one side and denied on the other. Every body living near, whether in public or private life, must have been excited and interested in the clamorous controversy which was so long and so fiercely carried on. Yet this *espediente* on which, if it existed, all these contests must have turned, was found by no officer, seen by no witness, and produced by no party. When this is considered in connection with the fact that the records in the Alcalde's Court were very meagre and few—a list of them does not cover half a sheet of foolscap—the non-existence of the paper becomes as clear as any negative fact can be made by judicial evidence.

But that is not all. The papers of the Alcalde were on two occasions made to go through very narrow places, where only one could pass at a time, and then under the inspection of vigilant eyes. When the last Mexican Alcalde delivered the records to the first American officer, a list of them was made out and receipted for. *This espediente was not on that list.* Again, when the State Constitution was established the Alcalde's office was abolished, and the records previously kept there were distributed among the new officers; some going to the Mayor of San José, some to the Clerk of the County Court, and some to the Recorder. The officer who made this distribution and examined the papers, one by one, for that purpose, swears that *this espediente was not there then.* Can demonstration go further?

It may be added, that it could not have been among the Alcalde's archives when Weekes signed the certificate for Forbes in January, 1848. They were not guilty of a *gratuitous* fraud. They would not have got a false copy falsely certified if a true copy with a true certificate could have been had as easily, for they must have known that in such a case truth would serve them, not only as well, but much better than falsehood.

The paper was produced in Court by Mr. Houghton the Deputy Recorder, and is by him marked filed 25th February, 1853. which he swears he did at the request of James A. Forbes. Capt. Halleck says that he and the Mayor, Mr. Belden, took it

to the office of the Recorder, who was then a Mr. Richardson. Neither Belden nor Richardson have been sworn. But it is shown that on the back of the paper there is a note in pencil, that it was filed by Richardson 21st January, 1851. How or when that note came upon the paper does not appear. It is tolerably fair to infer that it was not there on the 25th of February, 1853. Why would Mr. Houghton have marked it filed on that day, if there was already on it a file mark of earlier date? This pencil mark of Richardson is a mysterious but not very important affair.

If the *espediente* went to the Recorder's office in January, 1851, it must have disappeared again soon afterwards. Houghton, who had charge of the office did not see it there until February, 1853. In that month he was visited by James Alexander Forbes, and requested to search for the record of Castillero's mining title which was this paper, as described by Forbes with great exactness. They searched diligently for more than one whole day without success. But after Forbes went away Houghton found it when he was not looking for it; it turned up just under his hand. There can be no reasonable doubt that Forbes, while pretending to search for the paper had slipped it into a pigeonhole clandestinely. The letter of 1st of December, 1849, from Alexander Forbes to James Alexander Forbes, shows how highly the "well-known cleverness" of the latter gentleman at such tricks was appreciated by his confederates.

Such is the Halleck Espediente—produced by the claimants as the original record evidence of their mining title. There is not a scintilla of legal evidence to sustain it. Apart from the contradictions and falsehoods of the witnesses who swear to the act of possession, this Court has many times decided that parol evidence, for such a purpose, is inadmissible. The allegation that it is a record, is not only unproved but is met by overwhelming proof to the contrary. Its history cannot be traced back with any certainty further than February, 1853. It is plain to demonstration, that it was fraudulently dropped among the archives at some time not earlier than December, 1850.

No. 8, the *Fernandez espediente* is so called merely because

it was introduced as an appendix to the deposition of that witness, who swore that it was in the handwriting of Salvio Pacheco. Pacheco being called, testified that he wrote it, but did not say that it was a copy of any original. Chabolla, by whom it purports to be certified, under date of 13th of August, 1846, was asked no question concerning it. The introduction of this document, as it was introduced, without the least proof to sustain it, confirms the falsehood of the others, not only because it differs from them, but because the want of all evidence to show what it was copied from makes the inference irresistible that no original was in the office when it was made. If it had been truly copied in 1846 from an original record, which was then in its proper place, it cannot for a moment be supposed that the claimants would have failed to prove it by Pacheco and Chabolla, who were both on the stand.

No. 4. The *Walkinshaw espediente.* It is scarcely credible, but it is true, that, after these three failures, the claimants were bold enough to produce a fourth espediente, differing from all the preceding ones. It came from their own custody. They found it, as they allege, among the papers of Walkinshaw, one of the claimants, who had died; and it bore on its face the evidence that it was mutilated. The testimony, by which they tried to authenticate it, sets the fraudulent character of the claim in a very strong light. The two petitions of Castillero are certified by Chabolla as copies from the record, with date of January 18, 1846. To the act of possession there is no certificate at all; probably because the certificate for that was torn off with the writing of partnership which the heading shows to have been a part of it, as originally made up. The espediente then, as produced, consisted of the two petitions, each certified by Chabolla, and an uncertified copy of the act of possession, with evident marks that one or more subsequent papers had been detached before it was brought into Court. Chabolla was called to prove that the two petitions were truly copied at the date he certified. He swore that he could scarcely read; that he could write nothing but his name; that the papers *were brought to him from the mine*, and he signed them without knowing what was in

them; he never saw any originals; all he knows about them now is that they are papers. This fraudulent imposture upon the ignorance of Chabolla was practised by Guttierrez. The espediente and certificates are all in the handwriting of that infamous man; so is the ante-dated writing of partnership; and so is most of the Halleck espediente.

But the "*Act of Possession*" was not certified as a copy, and so the claimants determined to prove it as an original. When Pico Norriega and Suñol testified, several years before, to the Halleck document, they swore to the making of only one act of possession. But in 1860, they supplemented that testimony as the exigency of the case required, by swearing that two originals were made, and that this Walkinshaw document was one of them.

The Court below received this paper and treated it as genuine! The contradiction of the witnesses by their own previous depositions; the admitted falsehood of Chabolla's certificates; the mutilated condition of the paper itself; the difference between this espediente and each of the three others, which the claimants had before alleged to be true; none of these things seem to have excited a suspicion in the minds of the judges unfavorable to the claimants. The confiding simplicity of their faith is touching, but the example is not edifying.

Such are the four espedientes—the original and its three copies—destroying one another by self-contradiction; differing by the absence from one of whole papers found in another; differing in what purports to be the same papers; differing even in matters so important as dates of time and place. The original (the *Halleck*) claims to have been archived at the time it was made, but no official mark on its face or on its back justifies the assertion, and it is proved by the affidavit of the claimant's own counsel, and by the uncontradicted testimony of other good witnesses, not to have been among the records for at least five years after its date. Of the three pretended copies, one (the *Fernandes*) is without any proof whatever, though the person who wrote it with his own hand, was not only in full life, but actually called as a witness by the claimants. The certificates

appended to the other two (the *Weekes* and the *Walkinshaw*) are proved to be false by the very officers who made them.

All the known facts and circumstances connected with the case, and the whole conduct of the original claimant, his associates and grantees, are inconsistent with the belief that this title or any part of it was made at the time it bears date.

Castillero went to Mexico in March, 1846. He had no papers with him like those. He claimed that he had discovered and denounced a mine in the Mission of Santa Clara, but he neither mentioned nor showed such a title as this. When Mr. Negrete, as agent of Forbes, began to bargain with him for the purchase of shares, he was called on to show his title, and he showed nothing but the "writing of partnership;"—the paper now admitted to be ante-dated—and he did not allege that he had any other title.

When he came to make a formal conveyance of the shares to Forbes, and to recite his title in the act of sale, he recited only the writing of partnership. No other title is recited by him, or by any of his grantees, in any of their numerous conveyances, down to the year 1852, when references to the espediente first begin to appear in their deeds.

The petition of José Castro, one of the *socios*, ignores this title for *nine hundred* pertenencias by asking for three more pertenencias *in continuance of the first.*

When Alexander Forbes petitioned the Alcalde for four consecutive pertenencias, he certainly could not have intended to claim under a title which gave him nine hundred.

The effort of a party to get illegal evidence into the case is always a fair ground of something more than suspicion. These claimants, besides their struggle for Mexican depositions and their introduction of hearsay from the Sandwich Islands, have filled the record with matters not only irrelevant, but unauthorized by the loosest rules practised in other cases. *Ex uno disce omnes:* They caused the exparte affidavit of Alexander Forbes to be taken at the Mansion House before the Lord Mayor of London, introduced it into their case, and it actually comes here as part of the record.

But there is another class of facts in this cause which cannot fail to make a profound impression upon the mind of the Court. We refer to the various acts of fraud determined upon, attempted and actually perpetrated by these claimants, or some of them.

The certificates appended to both branches of their title, as filed in the Land Commission, were false, and known by the claimants to be false. One was the Weekes' certificate, already adverted to. The Lanzos dispatch was certified by Jesus Vejar, a notary public at Tepic, in Mexico, who declared under his official seal that the dispatch had been *respected and obeyed* by the Mexican authorities that governed in Upper California in 1846, according to insertions which those authorities had made in acts passed on the subjects of which they treat, which insertions, *he, the notary, had seen.* All this was false. The dispatch never was in California until long after the Mexican authorities had been expelled, and, of course, the notary had seen no acts of theirs on the subject. He says, in the certificate itself, *that he made it at the request* of Barron, Forbes & Co.

That the "writing of partnership" is ante-dated has already been mentioned as a *material* fact. View it now as a *moral* circumstance, affecting the *status* of the parties in Court. It is their most important paper, if any one be more important than another; and they themselves have always treated it so. The first representation of Castillero to the Alcalde asserted the previous formation of the partnership. Possession was delivered to the Company not to Castillero. The title to one-half the *barras* at this moment depends upon the fact that the *Socios* had an interest to that extent in the mine by virtue of the *previously existing partnership;* for they claim it on that ground alone. It was, therefore, manifestly necessary for them to show that a partnership had been formed before the other proceedings commenced. They could not prove this by parol, and did not attempt it. They produced a written agreement of partnership, *dated to suit the purpose,* and that agreement is now *admitted to be ante-dated.* This paper they put into the first espediente they produced, got it certified by an Alcalde to be "a true copy to the letter" of an original in his office; filed it with the petition

as one of their muniments of title, and passed it on the Land Commission as a genuine paper with a true date. In the District Court they adhered to it with the same inflexible pertinacity, stood over it steadily, resisted fiercely every attack which went to impugn its absolute verity. The Judges were imposed upon; they believed the paper to be truly dated, and found that as one of the facts upon which they based their decree. The guilt of all this seems to us horridly aggravated by the consideration, that the evidence was, all the while, within their immediate reach, by which they could have shown how, when, and why the paper was made, and fully explained the false date, if it was capable of explanation. Gutierrez, who wrote it; Arce, who signed it as attorney for one of the parties, and Manuel Castro, the Prefect before whom it was celebrated, were all competent to testify, were all in full life, and none of them was called; but Antonio Pico, the ever-ready and willing witness, was relied on to make the false date appear like a true one. But now, the case being here on appeal, the counsel for the claimants look carefully over the record, and with the frankness which might be expected from their high character, admit in their briefs and in their arguments, that the evidence which shows the paper to be ante-dated is too clear for contradiction. Their candor explodes in a moment the imposture which the claimants persisted in for ten long years.

Look at the letter from Alexander to James Alexander Forbes, dated 1st of December, 1849. Nobody pretends that more than one dispatch was ever issued by Lanzos, and that was addressed to the Governor. But here another one, totally different, and addressed to Castillero himself, is spoken of as being in possession of the claimants. It must have been a forgery. What is worse, the writer of the letter, after stating the superior value of the forgery over the genuine document, coolly suggests to his correspondent, that he withdraw the one from the record and substitute the other in its place.

Upon these facts we put no harsher construction than the Judges of the District Court did when they granted the injunction, as may be seen by their opinions, printed in McAllister's

Reports. But the view then taken was somehow overlooked when they came to make the decision now under review.

The legal and just weight to which these fraudulent acts of the claimants are entitled, would make them decisive against a far better case than they have made out. The *odium spoliatoris* is always a perfectly fair element in the judgment of a Court He who spoils the evidence or perverts the means of ascertaining the truth, or otherwise poisons the stream of justice, especially if he does so by putting false papers into the case ceases to stand on the same level with honest suitors. Common sense applied to common affairs follows the same rule; a knave once detected in trying to cheat you is never trusted again. It is a maxim of the common law, as it was of the Roman law, and a rule of logic which all experience proves to be sound, that *qui semel est malus, semper presumitur esse malus in eodem genere.* When, therefore, a fraud is discovered in one paper, all other papers produced by the same party are presumed to be fraudulent. This presumption is not slight or easily repelled. OMNIA *presmuntur contra spoliatorem*—ALL things are to be presumed against the spoiler—and we have a right to invoke the natural indignation and anger which an honest man feels against those who commit these base and mischievous crimes; for this presumption is made "*in* ODIUM *spoliatoris*"—in *hatred* of the spoiler. We have not overstated the rule. Every text book on the law of evidence will bear us out. We may refer especially to Best on Presumptions, and the cases there cited.

But the portraits of these parties are painted by themselves, and the picture they have drawn is a part of the record. The letters they have written to one another describe their moral character, and show that they were actually engaged for a long time in using their best efforts to get false and fraudulent titles fabricated for the mine and lands in dispute. When it is once ascertained that a witness is capable of committing perjury, *all* he swears to is rejected as false. In reason and in law the rule is the same when a party is found to be capable of forgery: the papers not known to be fabricated must share the fate of those which are proved to be spurious; for every thing is cor-

rupt that comes from a corrupted source. *Falsus in uno, falsus in omnibus.*

The way in which these letters came out has been much commented upon. Their genuineness being admitted, it makes no difference how the Government got possession of them. But it was all perfectly natural. James Alexander Forbes was sore, and perhaps malevolent towards his former confederates in crime; because he and his family had been deprived of all share in that imperial fortune which was the fruit of their joint iniquity. He had filed his mind for Banquo's issue. While he was contriving the fraud, and doing his full share in the execution of it, they praised his "well known cleverness," counted on him "as a friend," and told him that he was working for "his own interest" as well as theirs. But when the deed was done, he was quietly dismissed to poverty and contempt.

Mr. Laurencel, a French gentleman, then residing in California, and Mr. Eldridge, had, or thought they had, an interest in opposing the claim, and they devoted several years with great energy, skill, and ability to the sole business of exposing the fraud. They knew that James Alexander Forbes had been in active correspondence with the claimants at a most interesting period in the history of their title, and they rightly conjectured that the letters then written would throw a flood of light on its character. They asked him to produce them, and when he was tempted by a consideration his "poverty but not his will consented," so far as to let them be used for the sole purpose of compelling a compromise. He did not dream that his former friends would continue to prosecute the claim, when threatened with the infamy which the publication of such a correspondence would produce. But the experiment appears not to have been tried. The District Attorney, learning that these letters were deposited with a banker, subject to the joint order of Laurencel and Forbes, issued a *subpœna duces tecum*, had them brought into Court by the Marshal, and there the whole disgusting conspiracy was laid bare.

The genuineness of these letters has never been seriously denied; the handwriting of the parties is clearly proved; there is

not the least doubt of their authenticity. But there is one other letter, not worse than these, which the claimants allege to be a forgery. It purports to be a copy of one written by Alexander Forbes, and it is a true copy, unless James Alexander Forbes and another witness named Birney, are both guilty of perjury They have attacked the general character of these witnesses under the circumstances that will not shake the faith of the Court. The statement that the original was stolen out of a carpet bag, at a hotel, without forcing the lock, either of the carpet bag or the room door, does not seem improbable, when we consider the skill of thieves, and recollect that none but a thief of "well-known cleverness" would be employed for such a purpose. But it is true that James Alexander Forbes was damaged on cross-examination, and it is much against him, that he is not only a Forbes, but admits his complicity in the guilt he charges upon the others. The Court will decide whether these considerations are sufficient to reject that one letter, and if so, attention will be confined to the others.

Those others are amply sufficient to show that the claimants formed a conspiracy to commit the most stupendous fraud that has ever been attempted against the United States, or any other Government; that they deliberately resolved to get false papers made at the City of Mexico, have them deposited among the archives, and afterwards taken out and certified as genuine; that these papers were to be made after the form furnished by one of the parties, and approved by the rest, with boundaries and dates agreed on; that two of the conspirators went to Mexico for the purpose of carrying out the design; and that they had every prospect of success. They did succeed, at least in a measure, for there is one letter which shows that a forged dispatch from the Minister of Relations was in the hands of the claimants, and sent to California to be used there. Besides, the affidavit of their attorney and agent, made in 1850, proves that they then claimed under a grant which was certainly a forgery, for it was dated before the declaration of war, and it is not now pretended that a genuine grant of such date was, or could have been made. When these facts are considered in connection with the

other fact that both their titles, as actually filed, were coupled with certificates from Weekes and Vejar known to be atrociously false, the claim must be regarded as utterly corrupt. If such a title could be sustained here, the courts of this country would cease to be a terror to evil doers, or a praise unto them that do well; virtue and vice would stand in equal favor, and all distinction between guilt and innocence would be wholly obliterated.

We think we have shown from the record, and by reasoning, which admits of no satisfactory, or even plausible, answer.

I. That the Lanzas dispatch, besides being obtained by fraudulent misrepresentation, is no title to the land in dispute, or to any land whatever, and was not intended to be a title.

II. That the papers produced, as a mining title, supposing them to be genuine, and the acts of the Alcalde, supposing them to be as asserted, are all of them palpable violations of the law, in letter and spirit, confer no right, and are totally void.

III. That this mining title, so far from being confirmed by the Supreme Government of Mexico, was never seen, or even heard of, by the officers of that Government, and consequently was not, and could not have been, pronounced upon by them.

IV. That those papers are not genuine, or made at the time of their date, but are ante-dated and spurious; because,

1. The alleged originals are not proved to have been archived, but on the other hand are shown, by plain and powerful evidence, to have been absent from the archives for at least five years after their date.

2. Nor is there any evidence by parol, that they were made at the time of their date. The two "Petitions" are without a witness to speak for them; the "Writing of Partnership" is admitted to be dated before it was made; and the "Act of Possession has nothing to sustain it, except testimony which is not only incompetent, but manifestly untrue.

3. Of the three copies, one is wholly unproved, and the certificates to the other two are proved to have been falsely made, at the instigation of the claimants.

4. The copies and the original differ, and by their mutual con-

tradictions, each one accumulates the proof that itself and all the others are false.

5. The non production of this title, for several years, and the attempt to claim under a different title, are convincing proofs of its non-existence then.

6. The silence of Castillero, and his grantees, concerning it, and the absence of all reference to it in their deeds and other transactions show that it was neither made at the time of its date, nor afterwards used in good faith.

7. The numerous frauds of the claimants; their use for many years of a paper now admitted to be ante-dated; the false certifi cates of Weekes, Chabolla, and Vejar, made at their instance, and uttered by them as true; the counterfeit dispatch from Lanzas; the grant they asserted to be made before the declaration of war; the deliberate determination disclosed in their letters to get other title papers fabricated; all this raises a powerful presumption against the honesty of the claim, covers it with *odium*, and makes its rejection the unavoidable duty of the Court.

Claimant's counsel, in reply.

The Court has heard a speech, teeming with imputations on the claimant's good faith. Every fact asserted in his behalf has been flatly denied. One of the counsel imputed fraud, forgery subornation of witnesses, and consequent perjury. He has unqualifiedly charged falsification of the public archives and corruption of public officers of every grade, from the grave ecclesiastic, who was Bishop of Puebla and a Minister of State, down to the humble rustic who administered legal remedies as a Justice of the Peace. It is difficult to meet these charges, except by a rebuke uttered in such mild and decorous form as may become the dignity of this place and presence; for there is no proof in the record affording the slighest support to any of them. Nor has either of the counsel distinctly presented even an imaginary proof tending to any such inculpation. The printed brief furnished us by the counsel for the Government

as the basis of their argument here and as the evidence of their preparatory research, does, indeed, attempt to designate some impeaching evidence. To our perceptions it contains only eight criticisms. We delivered to the counsel for the Government, before this argument commenced, a short printed note on each of them. By that note it was plainly shown that each of these criticisms was founded on a total and perfectly palpable mistake as to the actual contents of the record. That short commentary on the Government's brief is before the Court. Its effect was to prevent the only counsel who spoke to the facts, from using his brief at all, or laying his finger upon any one definite charge indicating any one piece of inculpatory evidence or, in fact, giving us anything definite to answer.

Perhaps this will not be considered a fair statement of our adversaries' course. It is true that, in a loose and general way, allusions have been made to some topics of impeachment. To each of these we will give a distinct answer.

1. Castillero is charged with misrepresentation in his petition to the *Junta*. His title to the two leagues of land and the ratification of his mining title are attempted to be impeached on this ground. Let us see with how much justice.

In a letter sent from Santa Clara to his friend, Ex-President Herrera, he says "at a distance of five leagues *from* this Mission to the west, [*i. e.*, the Mission of Santa Clara,] I have discovered," &c., Transc. p. 1784. In his more formal petition to the *Junta*, he says, "having discovered *in* the Mission of Santa Clara," &c., Transc. p. 1800. Both of these statements were true; for the mine was five leagues from the Mission village called Santa Clara. And in common speech "the Mission" embraced a considerable extent of territory. He did not mean that his mine was within the village; nor could he have been so understood. In order to appreciate the folly or presumption of this charge one must bear in mind, that *both* of these statements were laid before the *Junta*; they were *both* presented by the *Junta* to the Government. Surely there was no deception in this verbal difference.

2. To the local magistrate, Castillero stated that the mine was

on Berreyesa's rancho. This statement is not repeated in the application to the *Junta*. The cause of the change is fully explained.

We have produced and proven, in Berreyesa's own handwriting, his false representation, that his ranch was two leagues in extent. His heirs did not dare to produce in this Court the alleged grant for two leagues of which he so furnished a copy to Castillero. They only set up a grant for one league: *see their* case, 23 How. 500; Transcript, p. 2730, § 4, *Ib.* pp. 2728, 2741. 2735–2740. At first, Castillero acted on this misinformation; but soon afterwards he discovered the fraud. Transc. pp. 559 560, § 4, pp. 543, 441, 3049. Surely he was right in not repeating his mistake when addressing the *Junta*.

3. It is said that Castillero's mining title was not exhibited to the Government. There is not the slightest proof of this; nor is there any reason whatever to presume such a negative. The suggestion is the merest subterfuge. In his petition he stated—"I have denounced and taken possession not only of said mine, but also of three thousand varas in all directions, and complied with all the conditions of the ordinance." And in the 7th clause he stated—"the necessity of [the Government] approving the possession, which has been given me of the mine by the local authorities of California, in the same terms as those in which I now hold it." Transc., pp. 56, 57. Surely here is the most distinct reference to the fact that he had this title. After being thus notified of it, if the Government did not see the papers, it could only have so happened because they did not desire to see them, and therefore did not call for them. Indeed, no man can doubt but the Government was bound, in honor, conscience, and by its established policy, to confirm the mining title, even had it been utterly destitute of form or technical regularity.

The *Junta*, in their representation to the Minister of Justice, dated May 14, 1846, minutely discussed the legality of the "possession given to said Castillero by the local authorities of California." Transc., p. 54. Is it not the height of folly to presume that they did this without having the papers before them? Besides, how stale is this imputation! Señor Bassoco, a member of the *Junta*, and a participant in all these transactions, was

produced and examined in California. Miranda and Yrisarri, then clerks in the Ministry of Justice, were also produced. The Government's counsel did not ask any of these witnesses or any one of the Mexican officials whether he saw the mining title at the time in question. And suppose, through inadvertence, Castillero did not exhibit his mining title, what then? He talked to the *Junta* of it; he wrote concerning it; but, not being asked for it, he did not happen to show it. Where is the law or the principle of equity which would make such an omission fatal, or in any degree prejudicial to his claim?

II. On the 26th of May, 1848, the Commissioners who, on the part of Mexico, negotiated the treaty, stated that "no grant of lands" in California had "been made since May 13, 1846." This statement is supposed to have some influence on the case. For many reasons it is altogether without probative force—as mere evidence of the fact it is wholly without weight. 1st. The Commissioners had no access to the National Archives, as the capital and all the public documents were then in our military possession. They could only speak from report of such clerks or former officials as happened to be within reach at the moment. 2dly. The period referred to was two years distant, and the date of this grant was but a single week later than the date mentioned. 3dly. According to any view the Commissioners could have had, the grant in question was most insignificant in extent and value, and was most likely not to be remembered with precision as to its date. It was a common practice to grant gratuitously eleven leagues of good, level farming land to any one who would undertake to build a house and live upon the tract. This grant embraced only two leagues and was on an uninhabitable mountain. Mines, strictly speaking, were never *granted.* The mere discovery was a meritorious basis of right. It gave an equitable title, *ipso facto.* The forms of registry or confirmation, were indeed necessary. But they could not be justly denied to the first discoverer, if he merely asked for their observance. 4thly. Certain other circumstances taken in consideration, this statement is quite destitute of force. Nearly all the grants of land in California were made by the Governors and Departmental Assem-

blies without any intervention of the Supreme Government. It was impossible that those Commissioners could have known whether any such grant existed or how many of them had been made subsequently to May 13, 1846. Several of later date have been confirmed by this Court.

The instructions from the Department of State to Mr. Trist, our Commissioner, mentioned May 13, 1846, as a fit date to be suggested in the negotiations. It was the day on which Congress recognized the existence of war with Mexico. But no importance was attached to the precise day. "If necessary," say the instructions, "the date may be changed to the month of September, 1846, when the American forces took possession of California." Transc., pp. 2958, 2959. The discrepancy in date between this grant and the 13th of May, 1846, is about a week. History, the Act of Congress, and the proof in this case, all show that the Americans took possession of California July 7, 1846, yet here we find our Secretary of State, on the 15th of April, 1847, asserting that possession was not taken until some time in September, 1846. This is a discrepancy of eight weeks! Was that Department guilty of fraud and misrepresentation?

This declaration of the Mexican Commissioners certainly has no legal or technical force. Our Government has denied it recognition, as forming any part of the treaty; and it has been entirely repudiated. It has been regarded, throughout, as a thing of no validity. 31st Congress, 1st Sess., Senate Doc. No. 1, p. 84. The Act of Congress, under which this claim is made, expressly concedes that the power of Mexico to grant lands in California continued until July 7th, 1846. 9 Statutes, p. 634, § 14. And this Court has frequently so decided. *U. S.* vs. *Pico*, (23 How. 326.)

III. Two remote circumstances of the most petty description are gravely urged as throwing some doubt on the validity of the Mexican two-league grant.

1. The dispatch of Castillo Lanzas, as Minister of Relations, was proven by that gentleman himself, and by Velasco, the clerk in his Department, who wrote it. Transc., p. 2201. It was verified by numerous witnesses, and a host of collateral circumstances

We cannot suppose that its genuineness is seriously disputed yet, on this topic, a singular piece of captiousness is displayed. *Vejar*, a notary at Tepic, in March, 1850, certified this to be an authentic instrument; and, according to the custom of Spanish notaries, he gave the knowledge on which his conclusion in favor of its authenticity was based. It was that it "has been respected and obeyed by the Mexican authorities that governed in Upper California, A. D. 1846, according to insertions which the said authorities made of the said instrument in acts which they passed." He adds, by way of emphasis, and, as it might be thought, for a climax, that "Señor Don Andres Castillero recognised it." Transc., p. 68. This has been exclaimed against as a false and fraudulent certificate. It is said this poor notary meant to certify that he had been away off in the wilds of California, and had there seen the Governor of California put Castillero into possession! Could any suggestion be more frivolous? His meaning is evident. On December 17th, 1846, Castillero, at Tepic, the residence of this Mr. Vejar, by solemn act. before notary Nazario Fuentes, confirmed the contract of *Avio* for working this mine. On that occasion this dispatch was produced, recognized as genuine by Fuentes, and inserted in his official record. Fuentes being dead, Vejar, on the strength of that record, expressed the opinion in question. Transc., pp. 1195 -1203. This certificate never was or could have been used as evidence. It never was so used; and, indeed, it is perfectly true.

2. Mr. Alexander Forbes, of Tepic, answering by letter, one of the technical scruples suggested by James A. Forbes, states that he had deposited, or registered at Monterey, a counterpart of the land grant, which was directed to Castillero himself, instead of being directed to the Governor. Transc., pp. 843, 396, 401. James A. Forbes, who was intimately conversant with the acts of Mr. Alexander Forbes in California, whilst testifying in Laurencel's pay, and under the influence of great vindictiveness against the New Almaden Company, admitted that he never searched at Monterey for this paper, very desirable as he must have deemed it. He testified that he forebore to search from a conviction that Mr Forbes was "mistaken." Transc., p. 490

IV. The attack upon the claimant's title papers, connected with the proceedings before the Alcalde, belongs to a school happily heretofore unknown in legal practice.

A brief narrative of the facts deducible from the record affords the readiest means of exhibiting the emptiness of this assault.

Castillero first supposed he had discovered a mine of gold and silver; he so represented to the Alcalde November 22d, 1845 Soon afterwards he ascertained the presence of quicksilver, and he made his second representation to that effect on December 3d, 1845. The Alcalde visited the mine on the 30th of December, 1845, gave him possession, and executed in duplicate his act of possession. One of these was deposited in the *jusgado* or Alcalde's Court house, the other was returned to Castillero; and, at its foot, he took the Alcalde's receipt for his fees. By accident, the date "30th" was left blank in the duplicate which remained with the Alcalde.

Sometime between the discovery of the quicksilver, late in November, and the 2d of December, 1845, Castillero formed a partnership with José Castro, Real and the Robles for working the mine. Doubtless the article of partnership was written in November, and a blank left for the day; but it was not signed until December 2d. They then filled in that day, but neglected to alter the month. By its terms, M. Castro, the Prefect, was to furnish certified copies to the parties. He did so. His certificates of authentication all bear date on December 8th, 1845.

On 13th January, 1846, Castillero caused to be made a duplicate of each of his two petitions to the Alcalde Pico, and had them certified by Pedro Chabolla who had succeeded Pico as Alcalde. He then made up, for himself, what, according to the Spanish practice and phrase, might properly be called a complete *espediente* or record of his mining title. To this he himself, with his own hand, prefixed a heading or table of contents. That table truly stated the contents; and they were 1st, a copy of his first petitition of November 22d, 1845, certified by Chabolla January 13th, 1846. 2d, by a copy of his second petition of December 3d, 1845, certified by the same person. 3dly, his

original duplicate act of possession, dated December 30th, 1845. 4thly, the receipt for fees. 5thly, his copy of the article of partnership authenticated by the Prefect, December 8th, 1845.

When Castillero went to Mexico in April, 1846, he took this *espediente* with him. We call it Castillero's *espediente*. Late in December, 1846, he confirmed the contract of *Avio* and sold several of his shares to Alexander Forbes. He thereupon delivered this *espediente* to that gentleman.

Mr. Alexander Forbes had it in his possession whilst in California in 1848. He returned to Mexico in March, 1848, leaving this *espediente* with Walkinshaw, the local Director of the mining operations. Walkinshaw was dismissed from office in 1849, and thenceforth until his death, he was on ill terms with the *Aviadores*. In 1853, he sued them. In 1854 his suit was dismissed. He was a peculiar man and in very ill health for two years prior to May, 1858. At that date, he went to Scotland and soon died. In July, 1860, this *espediente* was found in the hands of his executors, in an envelope endorsed in Walkinshaw's own handwriting. All the papers, as called for in the table of contents, were found with it except the copy of the article of partnership. How that became detached is not proven: it is unknown. Perhaps James A. Forbes has it.

In 1857, Alexander Forbes being very aged, had retired from business, and gone to reside in London. Walkinshaw was hostile to the *Aviadores*, and petulant from ill health. All who had been intimately conversant with the minute details of the transactions, were thus beyond reach except James A. Forbes, and he was plotting with Laurencel. The whole juggle about discrepancies between copies was gotten up at this date under his instructions. It was the offspring of his subtle and fraudulent genius.

On January 20th, 1848, Mr. Alexander Forbes was at the mine, giving attention to its development. Walkinshaw was director. James A. Forbes was living near it, and was, no doubt, striving to supplant Walkinshaw, which he effected soon afterwards, though his own term in office was of brief duration. At this time James A. Forbes seems to have been quite officious

He played the anxiously subservient to Alexander Forbes. Among other things, James A. Forbes, at this date, wrote out, for what reason none but himself can now tell, a very formal *espediente*, doing every part of the work with his own hands. He did not copy this from the papers in the Alcalde's office but from Castillero's *espediente*, then in the possession of Alexander Forbes. He made two alterations from it. This was perfectly idle, and is only explicable by his tendency to falsification. He altered the date of Castillero's first representation as to place, making it "Pueblo of San José Guadalupe," instead of "Mission of St^a^ Clara." He left out of the receipt for fees the repetitious statement, that the mine was on Berreyesa's land. He presented this paper to James W. Weekes, then Alcalde, who signed the certificate prepared for him, that it was a true copy, "made to the letter," of the "*espediente*," in the archives of the *jusgado*. Weekes was an American sailor; he was ignorant and intemperate, but intelligent and honest. Such is the proof. He had often seen the originals in the *jusgado*. He thought the papers a true copy, and did not advert to the necessity of making a comparison. This is the paper which the Government counsel call the Weekes *espediente*. It was not given in evidence, or relied upon by the claimant. His attorney's clerk, indeed, used it in making a copy to be annexed to the petition before the Land Commissions. No other use was ever made of it, except by the Government's counsel. They put it in evidence, in the District Court, in 1857, for the purpose of showing discrepancies in copies.

The title papers given in evidence by the claimant before the Land Commissioners, and alone relied upon throughout, were the originals which had always remained of record; first, in the Alcalde's *jusgado*, then in the office of the Mayor of *San José*, to which it was removed from the *jusgado*, with a great quantity of other Spanish documents, on the change of Government, and afterwards in the office of the Recorder of Santa Clara County, to which it was removed in January, 1851. The custody in these respective offices is most explicitly proven by a vast amount of unimpeached and clear testimony in each and every

year from 1845 to the time when this claim was filed. See Claimant's Brief, pp. 69–81. The only hint against this evidence is in the testimony of two clerks in the office. H. C. Melone did not hear of these papers being in the office. Houghton testified that in February, 1853, he searched for *a record* of them *in the books*, at James A. Forbes' request, but "not for the paper itself." He further said, "I think I must have found it by accident, because no one ever asked me to search for it." This was in 1853. The Government counsel proved the genuine official endorsement upon it of a prior file mark. "Filed 3 o'clock, P. M., 18th Jan'y, 1851; J. T. Richardson, Recorder, S. C. C." Transcript, pp. 253, 323, 324. But it is insinuated that James A. Forbes, the Government's own witness, "foisted" this paper into the Recorder's office in 1853, and that, too, in opposition to his own testimony.

The set of papers thus produced from the public records superabundantly proven, and their continuing public custody clearly established, we have called the *Alcalde's espediente.* The Government's counsel is pleased to designate it the *Halleck espediente.*

The Government's counsel speaks of another paper which he dignifies with the title of the *Fernandez espediente.* This paper performs no very important office. It was put in evidence merely as part of the chain of circumstances showing continuous custody of the *Alcalde's espediente* in the *jusgado.* It is an exact and faithful copy of that paper, made by Pacheco, the Alcalde's secretary, and certified by Chabolla, then Alcalde, on August 13, 1846. It is distinctly verified by unimpeached evidence. Transcript, pp. 622–624.

The article of partnership, though inserted in Castillero's own *espediente*, does not appear in the Alcalde's. It was not necessary to file it with the Alcalde. It was deposited with the Prefect. Castillero appears to have thought it proper to have the fact noted in the Alcalde's record, that a partnership had been formed. When going to Mexico, in April, 1846, he drafted and left with General Castro, his partner, a petition setting forth the fact. Castro afterwards, in June, 1846, had this petition

engrossed, signed it, and presented it to Dolores Pacheco, then Alcalde, who ordered it to be archived. It was accordingly then attached to the Alcalde's *espediente*. The claimant's counsel did not put in or prove this petition, as any part of their case. They regarded it as immaterial. The Government's counsel put it in evidence in the District Court in 1857, as part of the game of difference in copies.

This idle show about trivial differences in copies, naturally induced the claimant to put in much evidence merely to answer it, but which was otherwise wholly useless. The attempt to confuse on one side, has led, on the other, to the multiplication of oral evidence of little moment and to the production of papers essentially unimportant. Thus the record has been expanded and the case complicated with a variety of irrelevant issues But the opposition will not succeed in this attempt,

> "to rise,
> By nonsense piled on nonsense to the skies."

Diligence is indeed somewhat tasked by the mass of materials; but the most moderate share of intelligence is enough to enable integrity to see its way.

When Castillero's *espediente* was found among Walkinshaw's papers, in 1860, it was put in evidence. Many of the witnesses were recalled and some were added. Its authenticity was fully and clearly proven. But it had no office to perform, except the superfluous one of giving a precise clue to every one of the trivial discrepancies in copies before adverted to. Except in some place where the very madness of imputation reigned, these discrepancies would be regarded as insignificant and unworthy of any answer or any notice. 1 Black, pp. 284, 285.

It is a gross mistake to say that the claimant produced paper proofs of title, which though professing to correspond, are found to conflict. His mining title-paper, from first to last,—his only documentary proof of that title before the Commissioners or at any stage,—was the original record of 1845, as found in the filed record; that is to say, his two original petitions and the Alcalde's act of possession. Every other paper came in incidentally in

the singular assault made upon this title or in the resistance to that assault.

It is not true that Castillero, in any of his deeds, ever referred to the article of partnership as a basis of his title. He referred to it merely in his covenants that the restraint upon alienation imposed by it should not be an impediment to his vendee's title, and that his partners shall ratify that title. This plainly appears by his deeds in the record. His deeds were drawn by Mr. Romero, an able Mexican lawyer. They state his title to be as discoveror, which was precisely the fundamental truth. It was not necessary nor is it usual to detail, in a deed of sale, every thing done by the grantor to secure his title. Transcript, p. 1203. Besides, how frivolous is this notion of non-reference. Surely no man can deny, without a blush, that Castillero did in fact, take *some* proceedings before the Alcalde! And again, a reference to the article of partnership was itself a reference to those proceedings. The article asserts that Castillero conformed "in all respects to the ordinance of mining."

In December, 1850, Jones, the counsel for Berreyesa, desiring to take some technical exceptions to the title of the Almaden Company, sought for the *original* title papers. The original, in Spanish law and practice, is not the record in the public office, where legal action is had, but the *copia autorizada*, or authenticated document, issued from such office.

We have seen that *this* original of the Alcalde's act of possession, *i. e.* the duplicate delivered to Castillero was, at this time, in the possession of Walkinshaw. He was full of rage and hostility, on account of his dismissal from office in 1849, and it was not known to be in his possession by any of the *Aviadores*, or their agents in California. It is presumable that the Castillo Lanzas' dispatch was then in Mexico. It certainly was in Tepic, in that year. Transc., p. 68. General Halleck testified, that he believed these documents were in Mexico. Transc., p. 233. This is absolutely urged as evidence that they did not exist at all!! Can this suggestion deserve an answer? Much is said, too, about this deposition stating that the land-grant was made prior to the declaration of war. This is a very petty criticism. War never was

declared. An Act of Congress was passed, May 13, 1846, which recognized war as existing. On May 12, 1846, Castillero applied for the two leagues of land; and on the 20th, they were granted to him. In 1850, without the papers before him, or being able to specify their precise dates, General Halleck testified to his belief that the grant was made before the declaration of war. What a shocking anachronism! Are we contending with men of common sense, or with men merely seeking a pretence for confiscation, and willing to cover the wrong by any paltry subterfuge?

The denial of our allegations is absolutely frivolous. Notorious facts, which it is impossible materially to post-date, or ante date, raise so strong a presumption in the claimant's favor, that, in the absence of all written evidence or other direct proof, it would be an irresistible inference, that transactions essentially of the nature indicated by him must have taken place at the very times alleged. The proceedings before the Alcalde are precisely such as the circumstances would naturally have given rise to; and he had no means of resorting to any other. That they could have been omitted is incredible. And if the city, with all things therein, had been swallowed up by an earthquake, shortly after Castillero's visit to Mexico, in May, 1846, no fair mind would doubt his having appeared before the *Junta* previously to the catastrophe, related his discovery, solicited governmental aid, and received at least as much as is now claimed to have been conceded.

To impugn the known truth, as your Honors are urged to do, or to violate the public faith, by confiscating the estate of private individuals, on such petty pretences as have been suggested, would be a reproach to the American name, and a lasting stigma upon the justice of our country.

Mr. Justice CLIFFORD. These are appeals from a decree of the District Court of the United States for the Northern District of California, brought here under the Act of Congress of the 3d of March, 1851, entitled "an Act to ascertain and settle the private land claims" in that State.

Provision was made by the first section of that act for the appointment of Commissioners to examine all such claims, and decide upon their validity; and it was provided by the 8th section of the act, that every person claiming land in that State by virtue of any right or title derived from the Spanish or Mexican Governments, should present the same to those Commissioners for their adjudication.

Pursuant to that requirement, Andres Castillero, on the 30th day of September, 1852, presented the claim in controversy for adjudication to the Board of Commissioners constituted under that act, and at the same time submitted certain documentary evidences of title, to show that the claim ought to be confirmed. Among other things, he represented in his petition to the effect, that, in the year 1845, he discovered a mine of cinnabar in the then jurisdiction of San José, which is now known as the County of Santa Clara, in the State of California; and that having formed a company for working the mine, he, on the 3d day of December of that year, received from the Magistrate of that jurisdiction, in due form, the juridical possession of the mine, and also of certain adjacent land, to the extent of three thousand varas in all directions, averring, in the same connection, that all the facts so alleged would appear by the duly authenticated papers issued from the office of that Magistrate, copies of which were submitted with the petition. He also represented, that soon after his discovery, the record of his mining possession, or a testimonio of the same, was submitted to the *Junta de Fomento y Administrativa de Mineria*, the highest mining tribunal of Mexico; and that the members of that tribunal, on the 14th day of May, 1846, after an examination of the laws relative thereto, and mature deliberation, declared that the juridical possession so given, although embracing an unusually large extent of land, was in conformity to law, and fully justified by the circumstances of the case, and recommended to the President through the Minister of Justice, not only that his mining possession should be confirmed, but that two square leagues of land should also be granted to him in fee for the benefit of his mining operations. Petitioner accordingly claimed the two

leagues of land in fee as well as the mining possession, and in support of the claim to the land, he alleged that the Minister of Justice, on the 20th day of the same month, informed the *Junta de Fomento* that the President had acceded to the recommendation and granted the land; that on the same day he also notified the Minister of Relations of the same fact, in order that the proper decree might be issued; and that the Minister of Relations, on the 23d day of May, 1846, issued his order to the Governor of the Department, directing him to put the petitioner in the possession of the same two square leagues of land. Referring to the last dispatch, and assuming it to be a grant, he also alleged in his petition, that on receiving the same, he started to go to that Department for the purpose of surveying the land and taking juridical possession of the same, but was interrupted in his journey and prevented from so doing by the operations of the war between the two countries.

Such is the substance of the representations of the petition so far as respects the title of the claimant, but he also alleged that he had ever since continued in possession both of the mine and the land, and that he and those claiming under him had made extensive and expensive improvements on the premises. Claimant presented certain documentary evidences of title before the Commissioners which it becomes important to notice, because it was upon those that he relied to show that the prayer of his petition ought to be granted. They consisted of certain proceedings alleged to have taken place before the Alcalde of San José Guadalupe in respect to the registry of the mine, and certain subsequent proceedings of the *Junta de Fomento* and other public authorities of the home government, which were introduced as showing a confirmation of the doings of the Alcalde in respect to the registry of the mine and an absolute grant of the two square leagues of land.

I. Petitioners in such cases are required by the act of Congress not only to present their claims to the Commissioners, but also the documentary evidences of title on which they rely to support the same; and in obedience to that requirement the

claimant presented the documents referred to in his petition, of which the following is a summary:

1. His petition, dated November 22d, 1845, addressed to the Alcalde of first nomination, representing that he had discovered a vein of silver with a *ley* of gold on the rancho of José Reyes Berreyesa, which he wished to work in company, and requesting the Alcalde, in conformity with the ordinance on mining, to fix up notices in public places of the jurisdiction, in order to make sure of his right when the time for the juridical possession should arrive, according to the laws upon that subject. Immediately following the petition is a certificate signed by Pedro Chabolla, certifying that the petition is a copy of the original to which he refers, and which certificate purports to have been executed on the 18th day of January, 1846, at the Pueblo of San José Guadalupe, and to have been signed in the presence of two assisting witnesses.

2. Claimant also introduced another document purporting to be a supplemental petition to the same Alcalde, dated the 3rd day of December, 1845, in which he represented that, in addition to silver with a *ley* of gold, he had, in the presence of several bystanders, taken out liquid quicksilver from the mine, and requested to add that statement to his previous representation in order to secure his right. Both of the petitions purport to have been executed at the Mission of Santa Clara, and to have been signed by the claimant. Appended to the supplemental petition, also, is a certificate signed by Pedro Chabolla, which is of the same date and in all respects similar to the one connected with the first petition.

3. Following the last named petition and certificate is the document filed before the Commissioners as the copy of an original then relied on by the claimant as the proper evidence to show that he made due registry of the mine, and that the juridical possession of the same was duly given to him by competent authority in accordance with the regulations of the mining ordinance. Considering the importance of the document, it will be given in full. Unlike what is usual in title papers

executed by Mexican officials, it has no introductory caption whatever, but the translation reads as follows:

"There being no deputation on mining in the Department of California, and this being the only time since the settlement of Upper California that a mine has been worked in conformity with the laws, and there being no *Juez de Letras*, (Professional Judge,) in the Second District, I, the Alcalde of First Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office for want of a notary public, there being none, for the purpose of giving juridical possession of the mine known as Santa Clara, in this jurisdiction, situated on the rancho of the retired sergeant José Reyes Berreyesa, for the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this Court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the Republic, I have granted three thousand varas of land in all directions, subject to what the general ordinance of mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the espediente, deposited in the archives under my charge. This not going on stamped paper, because there is none, as prescribed by law.

"Juzgado of San José Guadalupe, December 30, 1845.

"ANTONIO MARIA PICO.

"Assisting witnesses:

"Antonio Suñol,

"José Noriega."

Annexed to this document, or immediately following it, is a receipt signed by the Alcalde, and purporting to have been executed at the same time and place as the principal document, in

which the signer certifies that he has received $25 on account of the fees for the possession of the quicksilver mine, named Santa Clara, which is in the jurisdiction under his charge.

4. Connected with the document, appertaining to the proceedings before the Alcalde, is another of considerable importance in the investigation, which is dated the 2d of November, 1845, and is denominated in the transcript as the writing of partnership.

Like the preceding petitions, it was executed at the Mission of Santa Clara, and by its terms it purports to be a partnership between the claimant and José Castro, Secundino Robles, and Teodoro Robles, and José Maria R. S. del Real, for the working "of a mine of silver, gold and quicksilver, in the rancho of José Reyes Berreyesa, in the jurisdiction of the pueblo of San José Guadalupe." Article 1 provides to the effect that the claimant, "conforming in all respects to the ordinance of mining, forms a regular perpetual partnership" with the persons before named, adding that "the half of the mine, which is that of which he can dispose, will be divided into three parts"—that is, "four shares to José Castro, four shares to S. and T. Robles, and the other four shares" to the Padre Real, "as a perpetual donation." Parties were restrained by the instrument from alienating their shares; and the provision was, that the expenses should be borne in proportion to the shares. Stipulation was also made that the claimant should have charge of the operations when present, but in his absence they were to be conducted by the Padre Real, and it was also stipulated that the agreement should be authenticated by Manuel Castro, the Prefect of the Second District. His certificate is appended to the document, in which he certifies, under date of the 8th of December, 1845, that it is a copy of the original, and the certificate purports to have been executed at Santa Clara, in the presence of the Alcalde, to whom the petitions were addressed. Congress recognized the existence of war between Mexico and the United States, on the 13th of May, 1846, and it is not denied that the official functions of the Mexican officers in that Department entirely ceased as early as the 7th of July in that year. Reference to these dates becomes necessary.

especially to the latter, because after that time the civil officers in that Department during the war were such as were appointed by our military commanders.

5. He also introduced another certificate, which applies to each and all of the foregoing documents. It is signed by James W. Weekes, Alcalde of San José Guadalupe, and reads as follows:

"I certify in due form, that the foregoing is a faithful copy, made to the letter from its original, the 'espediente' of the mine of Santa Clara, or New Almaden, which exists in the archives under my charge, to which I refer. And in testimony thereof I have signed it this 20th day of January, 1848."

Four additional certificates are also appended to this espediente, as it has been called in argument at the bar. Of these, the first was executed at San Francisco, and is signed by James Alexander Forbes, British Vice-Consul, in which he certifies under date of the 21st of January, 1848, that the signature of the last named Alcalde is the true and proper handwriting of the person it represents. None of the other three were executed in California, but respectively bear date at Tepic, in the Department of Jalisco. One is signed by Jesus Vejar, a notary public, in which he certifies under date of the 15th of March, 1850, to the effect that the signature of the British Vice-Consul is genuine. Another is, the signature of the first Alcalde at that place, in which he certifies under the same date that the mark and signature of the notary are those he is accustomed to use, and the last is the certificate of the Consul of the United States at that place, in which he certifies, under date of the 1st of December, 1850, that "the signatures attached to the foregoing document are in the true handwriting of the subscribers."

II. Other documents were also introduced by the claimant as showing a confirmation of the doings of the Alcalde in respect to the registry of the mine, and which it is insisted by his counsel establish his right to the two square leagues of land. They do not purport to be originals, but were admitted in evidence as sworn copies of originals, alleged to be on file in the archives of the *Junta de Fomento*, and other Departments of the Supreme

Government at the capital of the Republic. Briefly described, the documents of this class, introduced before the commissioners, are as follows:

1. Copy of a letter from the claimant, dated at the Mission of Santa Clara on the 19th of February, 1846, and addressed to Tomas Ramon del Moral, in which he states in effect that he has discovered an abundant deposit of cinnabar, and that he sends with the communication some of the ore and a little quicksilver, that it may be assayed.

2. He also introduced a copy of a letter from J. J. de Herrera, which was addressed to the same person as the preceding letter, in which the writer, under date of the 18th of April, 1846, professes to give certain extracts from two letters received by him at the City of Mexico from the claimant, while the latter was at the Mission of Santa Clara. These letters, as described in the copy of the communication given in evidence, were dated on the 19th and 22d of February, in the same year, and the extracts represent the claimant as saying that at the distance of five leagues from the Mission to the west he had discovered and denounced a very abundant mine of quicksilver, and that he had sent to his correspondent some of the ore procured from the top of the vein to confirm his statement, together with a little quicksilver which was taken out with the greatest facility.

3. Copies of two communications, showing that the specimens of ore so sent were submitted to the *Junta Facultativa*, and that an assay founded on a mean of the different specimens, gave a "*ley*" of twenty-five and a half per cent.

4. Copy of a letter or report from the President of the Junta to the Minister of Justice, under date of the 5th of May, 1846, communicating the fact of the reception of the specimens of ore and of the successful result of the assay.

5. Copy of the reply of the Minister of Justice, dated four days afterwards, in which he states that the President *ad interim* of the Republic learns with satisfaction that the claimant has discovered a deposit of quicksilver of excellent quality.

6. Claimant also introduced a copy of a communication signed by him under date of the 12th of May, 1846, addressed to the

Junta for the encouragement and administration of mining, as fully set forth in the transcript.

Referring to his discovery as a mine of quicksilver in the Mission of Santa Clara, he states that he has denounced and taken possession, not only of said mine named Santa Clara, but also of an extent of three thousand varas in all directions; that he has formed a company to work it, constructed the pit, and complied with all the conditions prescribed by the ordinance. Intimation is there given that he could easily have secured aid from foreign houses, but that he preferred that the establishment should be entirely national, and for that reason had not hesitated to apply to the Junta for such assistance as he at present needed. His representation was that he only wanted a small advance of $5,000, on account of the scarcity of coin in that Department, and an immediate remittance to the mine of retorts, cylinders, and other small distilling apparatus, and also iron flasks for bottling up the quicksilver. He suggested that he would have proposed a contract of partnership to the Junta as an *avio*, or some other agreement, if there had been time to furnish the proofs and details which would be required for such an arrangement, but being obliged to leave the capital within a few days, he found it necessary to restrict himself to "that which appears to present no difficulty and which may open a way to a future agreement." What he desired of the Junta was not only that they should accede to his requests as far as they had the power, but that they should send such as they could not grant to the Supreme Government, recommending their adoption, and with that view he submitted nine propositions, which were as follows:

"*First.* The Junta, in the act of approving the agreement, will give me a draft for $5,000 on some mercantile house in Mazatlan.

"*Second.* On my part, I bind myself to place in said port, within six months after leaving it, fifty quintals of quicksilver, at the rate of $100 each, which I will send from the first taken out, with absolute preference over every other engagement.

"*Third.* The Junta will order that there be placed at my dis-

position before leaving the capital, the eight iron retorts which it has in its office, and all the quicksilver flasks which can be found in the *negociacion* of Tasco, which are fit for use; and, lastly, it will deliver to Señor Don Tomas Ramon del Moral, my attorney, the sums to pay for the retorts, cylinders, and other kinds of small apparatus, which may be ordered to be made for the *negociacion*, to the amount of $1000.

"*Fourth.* I will receive the retorts of the Junta at cost price, and the flasks which I may select at $2 a piece, agreeably with their valuation.

"*Fifth.* The ascertained value of said retorts and flasks, and that of the sums which may be delivered to Senor Moral, I will return in the term of one year from this agreement, and also the premium on the draft on Mazatlan, in quicksilver, placed in said port at the price of $100 the quintal; but if the Junta should wish to take one or more 'acciones' in the mine, it shall be left as a part payment of the sum corresponding to one or more 'barras.'

"*Sixth.* While the company is being formed, during the period of one year, counted from the date on which this agreement shall be approved, and the $5,000 spoken of in the first proposition being paid, I will give the preference to the Junta in the sale of quicksilver placed in Mazatlan, at the rate of $100 the quintal.

"*Seventh.* The Junta shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine by the local authorities of California, in the same terms as those in which I now hold it.

"*Eighth.* It shall also represent the advantage of there being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my business.

"*Ninth.* For the compliance of this contract I pledge the mine itself and all its appurtenances."

7. On the 14th of the same month the President of the Junta communicated the letter of the claimant, or petition as he calls it, to the Minister of Justice, and in that communication the mine is described as the quicksilver mine in the Mission of Santa

Clara in the Department of California. Claimant also introduced a copy of that communication. Among other things, the writer states that the Junta "has no hesitation in recommending the petition" to the favorable consideration of the Government; that they, the Junta, are of the opinion that the sum of $5,000 should be advanced to the applicant on the terms proposed, and that they should be authorized to furnish him with such iron retorts and flasks as they had on hand, and to advance him the other $1,000 asked, which, as they stated, could be employed in the construction of retorts, cylinders, and other small apparatus for the use of the mine.

They also refer to the reasons assigned by the claimant for deferring the formation of a contract of partnership, or *avio*, and state, in effect, that they, the Junta, regard it as satisfactory. Reference is also made to that part of the claimant's petition in which he represents that he has denounced and taken possession not only of the mine, but also of an extent of three thousand varas in all directions, and their views upon that subject were, that the possession given by the local authorities was "not in conformity with the ordinance," because it embraced an extent greater than the ordinance allowed, but, notwithstanding that fact, they presented various arguments for the consideration of the Department to show, that, under the circumstances of the cases, it might be sustained. In respect to the two square leagues of land solicited by the claimant as a colonist, the Junta declined to express any opinion for or against the application for the reason, as stated, that they had no information upon the subject, and therefore left that matter to be decided by the President as he might think proper.

8. Both the petition of the claimant and the recommendation of the Junta were, by the Minister of Justice, laid before the President, and the former on the 20th of May, 1846, sent a dispatch to the Junta, informing them that the President had been pleased to approve, in all its parts, the agreement made with the claimant, "*in order to commence the working of said mine,*" and that the corresponding communication was made to the Minister of Relations to issue the proper orders respecting that

which was contained in the eighth proposition for the grant of lands in that Department. Under the same date a decree, so called, was entered by the Minister of Justice in the margin of the communication received by him from the Junta, in the following terms: "Granted in the terms which are proposed, and with respect to the land; let the corresponding order issue to the Minister of Relations for the proper measures of his office, with the understanding that the Government accedes to the petition." Copies of the dispatch of the Minister of Justice and of the last named document were also introduced by the claimant.

9. On the same day, the Minister of Justice sent a dispatch to the Minister of Relations, informing him of what had been done; in which it is also stated, that the President had acceded to the petition of the claimant, and that the dispatch was transmitted to the end that there might be granted to the claimant, as a colonist, two square leagues upon the land of his mining possession. Copy of that dispatch was also introduced by the claimant.

10. *Finally*, the claimant introduced a copy of a dispatch from the Minister of Relations to the Governor of California, dated on the 23d day of May, 1846, in which the former, after transcribing the dispatch to him from the Minister of Justice, and incorporating a copy of the same into his own dispatch, as an explanation of the transaction, adds as follows: "And I transcribe it to your Excellency, that in conformity with the provisions of the laws and decrees relative to colonization, you may give Señor Castillero possession of the two square leagues above mentioned."

Remark should be made, that in all of the documents introduced as copies of originals on file in the Department of the Supreme Government, the mine is described as one discovered by the claimant in the Mission of Santa Clara; and in no one of them is any allusion made to the fact that it was situated on the rancho of José Reyes Berreyesa, as represented in the first petition of the claimant, and repeated in the act of juridical possession alleged to have been executed by the Alcalde.

11. Parol testimony was also introduced by the claimant in support of his claim, both to the mine and to the two square leagues of land, to which some brief reference will be made. He proved by Charles S. Lyman, that he, the witness, made a survey of the land around the mine in the month of February, 1848, at the request of James Alexander Forbes, of California, and Alexander Forbes, of Tepic, in Mexico, who was at the mine at the time of the survey. His orders were to lay out two square leagues; and he states that he was shown a grant, or a copy of a grant, for that quantity from the Mexican Government. They requested him to locate the grant so as to cover certain mining rights called "pertenencia," extending three thousand varas in every direction from the mouth of the mine; and he states that it was so surveyed as to have the mouth of the mine as nearly in the centre as could be without covering land of the neighboring ranchos claimed by individual owners. Field notes of that survey were exhibited, and Fernando Alden, who was also examined by the claimant, testifies that he assisted in making a part of it, and he confirms the testimony of the first witness as to the location of the alleged grant. By his testimony it also appears that he heard of the grant in 1846, when he was in Mexico, and that he was employed by Alexander Forbes, the agent and partner of the claimant, to go to California for the purpose of working the mine, erecting buildings, and occupying the land so granted; and he testifies that he first went to live on the land about the 1st of April, 1847, and continued to reside there until about a year before he gave his testimony, acting as the agent and overseer of the company holding under the claimant. Witnesses were also examined by the claimant to prove that the copy of the act of possession executed by the Alcalde, and the other papers included in that espediente, were true copies of the originals, and that the originals were genuine documents. To prove these facts, he called and examined Frank Lewis, Deputy Recorder for the County of Santa Clara, who, upon being shown a certain paper entitled "Posesion de la mina de St^a Clara de Año 1845," stated that he obtained it from the office of the Recorder of that county. Having made that state-

ment, the witness was then requested to compare the copies filed in the case with the corresponding parts of that paper; and after having done so, he testified that they were true and exact copies. Two witnesses, Antonio Suñol and José Noriega, who, it will be remembered, were the assisting witnesses to the act of possession executed by the Alcalde, were also called and examined by the claimant in respect to the authenticity of the supposed original document. They were accordingly requested to examine the same, and having complied with that request, respectively testified that all the signatures, including their own, were genuine. Claimant also called and examined José Maria La Fragua in respect to the class of documents introduced as copies of originals on file in the archives of the Supreme Government, and his testimony was to the effect that he had compared all those documents with the originals in the City of Mexico, and found them to be correct.

Commissioners, or a majority of them, adjudged that the claim to the mine was valid, and confirmed the mining right or privilege of the claimant, as pertenencia, to the extent of three thousand varas in all directions from the mouth of the mine; but they unanimously adjudged the claim to the two square leagues of land to be invalid, and rejected that part of the claim.

Appeal was taken both by the claimant and by the United States to the District Court of the United States for the Northern District of California.

Much additional documentary evidence was introduced in the District Court, and more than one hundred additional witnesses were examined in respect to the matters involved, or supposed to be involved, in the controversy. Parties were fully heard, and on the 18th day of January, 1861, the District Court entered a decree confirming the claim to the mine, but diminishing the mining right, or privilege, as compared with the decree of the Commissioners, and adjudging the claim to the two square leagues of land to be invalid and rejecting the same. By the terms of the decree, the mining right, or privilege, of the claimant is described and defined as "a piece of land embracing a superficial area, measured on a horizontal plane, equivalent to

seven pertenencias," regarding each pertenencia as a solid of a rectangular base two hundred varas long, of the width established by the ordinance, and in depth extending from and, including the surface, to the centre of the earth.

Whereupon both parties appealed to this Court. No. 123 is the appeal of the claimant, and No. 133 is a cross-appeal of the United States.

Power to decide upon the validity of any claim presented to land in California, by virtue of any right or title derived from the Spanish or Mexican Government, as matter of original jurisdiction, is, by the Act of the 3d of March, 1851, exclusively conferred upon the Commissioners appointed under the first section of that Act. Appellate jurisdiction, however, is conferred upon the respective District Courts of the United States for the Northern and Southern Districts of California, and finally upon this Court. In deciding upon any such claim, the rule of decision is, as prescribed by the eleventh section of the Act, that the Court or tribunal making the decision shall be governed by the treaty under which the lands were acquired, the law of nations, the laws, usages, and customs of the government ceding the same, the principles of equity, and the decisions of this Court, so far as they are applicable.

III. Enough has already been remarked, in view of those provisions, to show that there are three principal questions involved in the record of very considerable importance.

First. Whether the claim of the petitioner to the two square leagues of land, under the rules of decision already mentioned, is shown by the documentary and other evidence to be a valid one within the meaning of the eighth section of the Act providing for the adjudication.

Secondly. Whether the Commissioners had jurisdiction to decide upon the validity of the claim to the mine and mining right, or privilege, as described in the petition, or in other words whether the claim to the mine, together with the pertenencias to the same, as recognized in the Mining Ordinance, is a claim to land within the meaning of the provisions of the 8th section of that Act.

Thirdly. Whether the claim to the mine, including the mining right, or privilege, as set forth in the petition, is shown by the documentary and other evidence to be a valid one under the rules of decision already described.

1. Title to the two square leagues of land, it is insisted, became vested in the claimant by virtue of the documents on file in the Department of the Supreme Government, as evidenced by the copies filed in the case at the time the petition was presented to the Commissioners. They consist, it will be remembered, so far as that part of the claim is concerned, of the communications from the claimant to the *Junta de Fomento*, their report or recommendation to the Minister of Justice, his reply to the same, together with the decree made by him in the margin of their communication, and his dispatch to the Minister of Relations, and the dispatch of the Minister of Relations of the 28d of May, 1846, to the Governor of the Department where the land was situated. Forty witnesses or more, mostly from the City of Mexico, were examined by the claimant to prove the authenticity of those documents, or of the corresponding originals, on file in the archives of the Supreme Government, and various other proofs, in the form of exhibits, were also introduced for the same purpose, filling a large space in the transcript which contains more than three thousand five hundred pages of closely printed matter.

Such testimony and proofs were regarded as essential, because it was and is insisted by the United States that the documents were fabricated, but in the view we have taken of the case it will not be necessary to decide or consider that question, and consequently neither the testimony of the witnesses or the exhibits on that point will be reproduced. According to the evidence introduced by the claimant, Mariano Parades y Arrillaga, assumed the functions of President *ad interim* of the Republic on the 15th day of December, 1845, and the same proofs show that he continued in authority as such until the 29th day of July of the following year, when he surrendered his power, and for a time took command of the army.

Counsel for claimants assume that during that period the

President was in the exercise of extraordinary powers, and it must be conceded that the evidence is full to that effect, although it may well be doubted whether such of his official acts as were in violation of law have ever been ratified by the Mexican Government. Assuming that the President was in the exercise of extraordinary powers on the 23d day of May, 1846, the claimant insists that the dispatch of that date from the Minister of Relations to the Governor of the Department of California, especially when it is considered in connection with the marginal decree and dispatch of the Minister of Justice of the 20th of the same month, is of itself an absolute grant of the two square leagues of land described in his petition.

Conceding the power of the acting President of the Republic to make such a grant of the public domain, the question then is one of construction, and in that view of the case it becomes necessary to examine with care so much of the several documents as relate to the claim for the two square leagues of land. Petitioner's representation to the *Junta de Fomento* was that he desired such a grant in order that he might be able to procure sufficient fire-wood for his mining works, and the effect of his request, as stated in his eighth proposition, was that they, the Junta, should recommend to the Supreme Government that there be granted to him, "as a colonist," two square leagues upon the land of his mining possession. When he made that request for a grant as a colonist he evidently referred to the colonization laws as containing the authority to comply with his request and make the grant. Those laws had then been in operation for more than twenty years, and consequently he must have expected, even if the Government acceded to his petition, that the grant would be issued in conformity to those laws, and of course must be executed by the Governor, subject to the approval of the Departmental Assembly.

Such also was the view taken of the matter by the Junta in their communication to the Minister of Justice, as plainly appears from the language employed by them in describing his eighth proposition. They refer to it as a petition in which the claimant solicits as a colonist two square leagues of land "upon

the surface of his mining property for the purpose of supplying himself with the fire-wood necessary for the reduction of the ores," evidently showing that they regarded it as an application under the colonization laws. Nothing is expressed in the decree or memorandum made by the Minister of Justice in the margin of the communication from the Junta which, if rightfully understood, affords any countenance whatever to the views of the claimant. Reliance is placed upon the introductory words, to wit: "Granted on the terms proposed," but it is so obvious from what follows in the same connection, that those words refer to the terms proposed as an arrangement for exploring and operating the mine, that it is difficult to see how any one can be misled in regard to their import. Justification for that remark will be found in the directions immediately given "with respect to the land," which are that the corresponding order be issued to the Minister of Relations for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition. Strong doubts are entertained whether the order, "with respect to the land," was intended as anything more than the usual office direction to the corresponding clerk in the Department to prepare and put in form a dispatch upon the subject which should express the views embraced in the marginal directions.

Support to that view is certainly derived from the fact that a dispatch was prepared and sent on the same day, which, in its concluding sentence, contains substantially the same language, in the form of a request that the "orders corresponding" may be issued. Other matters, however, are stated in the dispatch which ought not to be overlooked. After stating the fact that he had laid the communication of the Junta before the President, he proceeds to say that "His Excellency had been pleased to approve, in all respects, the agreement made with the claimant in order to commence the working of said mine," adding that he communicates the information that there may be granted to the claimant, as a colonist, the two square leagues of land, and requesting the Minister of Relations "to issue orders corresponding." Additional orders, therefore, were assumed to be necessary, and

the concluding sentence of the dispatch to the Minister of Relations, written on the same day, and already referred to, shows what kind of orders were contemplated at the time the marginal decree was made. Prepared as those documents were on the same day, they must be considered together, and when so considered, it is clear and beyond doubt, that the marginal decree with respect to the land was not drafted or intended as a grant or any evidence of a grant; for if it had been, the officer who drafted it never would have asked for any order upon the subject from a co-ordinate Department of the Government.

Request was made by the claimant, in the first place, that a grant might be made to him as a colonist, and it conclusively appears, we think, from an examination of those dispatches, that the Mexican officials who wrote them never for a moment contemplated that the claimant was to have a grant of land in any other mode than by the usual proceedings under the colonization laws. Abundant confirmation of that proposition, if any be needed, is to be found in the dispatch from the Minister of Relations to the Governor of the Department, which is the document that the claimant professes to regard as an absolute grant of the land described in his petition. Mexican officials, in their correspondence upon official matters of domestic concern, usually transcribe and incorporate into their own dispatches such communications as they have previously received upon the same subject from other official sources. Such was the course pursued by the Minister of Relations in his dispatch to the Governor of the Department. He accordingly transcribed into his dispatch a copy of the one sent to him from the Minister of Justice, in which is also contained a copy of the before mentioned communication to the Junta, and referring to the entire dispatch, he states in effect, that he transcribed it to the Governor in order that he, the Governor, in conformity with what is prescribed by the laws and dispositions upon colonization, may put the claimant in possession of the two square leagues of land which are mentioned in the communication. Conformity to the laws and regulations upon the subject of colonization grants is plainly contemplated and required by the directions of that

dispatch, and consequently it is clear that the Governor could not put the claimant into the possession of the described tract in any other mode than by the usual proceedings under those laws.

2. Claimant calls this a grant, and it is his privilege to do so if he sees fit; but it is vain for him to expect that this Court can give its sanction to any such manifest error. Vacant lands in California belonged to the Supreme Government, and the laws for the disposition of the same emanated from that source. *U. S.* vs. *Knight*, (1 Black, 242.)

General rules and regulations upon the subject were accordingly ordained, authorizing the Governors of Territories, under certain specific conditions, to grant such lands to such of the persons therein described as might ask for the same for the purpose of settlement and cultivation. Persons soliciting such lands were required by those rules and regulations to address a petition to the Governor, setting forth their names, country, profession and religion, and also to describe the land asked for as distinctly as possible, by means of a diseño or map annexed to the petition. He was not required to prove his representations, but it was made the duty of the Governor to obtain the necessary information to enable him to determine whether the case fell within the conditions specified in the regulations, both as regarded the applicant and the land. None of these conditions, of course, were ever complied with, because the proofs show, and it is conceded, that the dispatch was never transmitted to the Governor, and that the claimant never returned to that Department. Application for a grant was never made under that dispatch, and so far as appears, the Governor of the Department was never informed that it had been issued. Unless the lands were vacant, such an application would have been fruitless, as the Governor had no power to grant any other than vacant lands. Suppose it to be true that the mine is on the rancho of José Reyes Berreyesa, or that of Justos Larios, then the power of the Governor to make the grant was entirely wanting; and it would not benefit the claimant if it were now shown that the mine was and is on public land; because, if his representations are to be credited, he, and all those associated with

him, fully believed that it was not a part of the public domain. Contrary to this view, it is insisted by the claimant that inasmuch as the President, by whose direction the dispatch was issued and delivered to the party, was in the exercise of all the powers of Government, the non-delivery of the dispatch to the Governor of the Department is wholly immaterial, that the dispatch itself was a decree of concession, and the placing it in the hands of the grantee was a sufficient delivery to vest an equitable title at least in the claimant.

3. Power in the President to make such a grant is not denied by the United States; but the question is, whether he exercised or attempted to exercise any such power, which under the circumstances must depend upon the construction to be given to the dispatch of the Minister of Relations addressed to the Governor of the Department. Explanations already given show to a demonstration, we think, that such is not the true construction of the dispatch, and consequently the proposition of the claimant cannot be sustained, and in rejecting the proposition as untenable, we place our conclusion upon the ground that the proposition assumes an erroneous construction of the dispatch under consideration, and is based entirely on that assumption.

4. Attempt is made to support the proposition by some of the remarks of this Court in the case of *U. S.* v. *Castillero*, (23 How., 468,) but it is evident that the construction given to the opinion of the Court in that case is quite as erroneous as that given to the dispatch of the Minister of Relations. Title to the island of Santa Cruz, near the coast of that Department, was claimed in that case by virtue of a regular grant from the Governor. Such grant it is true had been issued by the Governor, under a special dispatch from the Minister of the Interior, but the statement is nevertheless correct that the claimant held the island under a formal grant which was in the list of grants included in the Jimeno index. Lands of the islands prior to the 20th day of July, 1838, had never been granted by the Governor of that Department, and the better opinion is that the colonization laws did not confer the power to make such grants. Authority upon that subject was on that day conferred upon the Governor in

connection with the Departmental Assembly by a general order, as is more fully explained in that opinion. Direction was given to the Governor on the same day by a special dispatch that one of the islands, such as the claimant in that case might select, should be assigned to him before they proceeded under the general order. He accordingly selected the island mentioned, and the Governor issued title papers to the donee. Objection was made here to the confirmation upon the ground that the grant had never been approved by the Departmental Assembly, but the Court overruled the objection. Absolute directions were given in that case in respect to lands not authorized to be granted under the colonization laws, and the power so conferred had been exercised and the doings of the Governor in making the grant acquiesced in for a period of eight years before the jurisdiction of the territory was acquired by the United States. Compare that statement, which is undeniable, with the facts of this case and it is obvious that the supposed analogy utterly fails.

By the terms of the dispatch under consideration the proceedings in this case were directed to be "in conformity with what is prescribed by the laws and dispositions upon colonization," and of course the discretion of the Governor and that of the Departmental Assembly were to be exercised in the performance of their respective duties under the obligations imposed by law. Something also remained to be done by the claimant in order to call forth the exercise of that discretion. He must prepare and present his petition describing the land, and he must also prepare and present, if required, a diseño or map of the land in order that the Governor might have the means of ascertaining whether the tract solicited was vacant and so situated that it might properly be granted to the applicant. No such petition was ever presented, and no action of any kind ever took place upon the subject. But we forbear to pursue the comparison, as it must be obvious, we think, to every unprejudiced mind, that the two cases are in no substantial respect alike. For these reasons we are of the opinion that the claim to the two square leagues of land cannot be sustained.

IV. Before entering upon the examination of the questions involving the validity of the title of the claimant to the mine and mining right or privilege claimed by him, it becomes necessary to consider and decide the question whether the Commissioners under the Act of the 3rd of March, 1851, had jurisdiction over such a claim. Counsel for the claimant maintain the affirmative of that question, but the jurisdiction of the Commissioners is denied by the counsel of the United States upon several grounds:

1. They insist, in the first place, that the ownership of a mine under the Mexican law was not the ownership of the land in which the mine was situated; that it was simply the ownership of the right to take from the soil the minerals therein to be found, and was recognized as a right, severed from all public and private land which was vested in the sovereign and which did not pass by a grant of the land, and was capable of being acquired only by a title from the sovereign power, wholly distinct from the title to the land.

2. Several of those propositions, if properly restricted and rightly applied, may well be admitted, because when so restricted and applied they are undoubtedly correct. Mines under the Mexican law may be the subject of rightful ownership, distinct from the land as such for agricultural or other ordinary uses. Ownership of a mine, however, as secured under the mining ordinance by registry and juridical possession, does not consist alone in the right to take from the soil the minerals therein to be found, but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period within the boundaries of the pertenencias appertaining to the mining right or privilege. Such rights are by law regarded as severed from private land and also from public land when granted by the usual forms of conveyance for agricultural or other ordinary purposes. Gamboa by Heathfield, p. 132, sec. 5. Rights to a mine not registered can only be acquired from the sovereign power, and it is true, as contended by the United States, that the forms of such a conveyance are wholly distinct from those employed in the ordinary

process of granting lands. Another branch of the same proposition, not yet reproduced, may also be admitted in the same qualified sense. Mining rights under Mexican laws undoubtedly are usually held upon conditions not affecting the title to the land as derived under the ordinary conveyances, and it is also true that such rights may be acquired and held by others besides the owner of the land under the ordinary grants, and that such rights are terminable when by their use the minerals contained in the soil are wholly removed. Granting all this, still the question arises whether a mine, together with the mining right or privilege appertaining to the same, is not land within the meaning of the Act of Congress under which the Commissioners were appointed. Persons claiming lands in California by virtue of *any right* or title derived from the Spanish or Mexican Governments are required to present the same to the Commissioners for adjudication, and of course the Commissioners have jurisdiction to decide upon the validity of all such claims. 9 Stat. at Large, 632.

3. Questions concerning mines and mining rights in Mexico depend in a great measure upon the provisions of the Ordinance of the 22d of May, 1783, which, although ordained long before her independence, by the sovereign of the parent country, is still in force and constitutes the principal code of the Republic upon that subject. Omitting unimportant words, article 1, of the 5th title, reads as follows: Mines are the property of my royal crown as well by their nature and origin as by their reunion declared by law. Article 2 contains the following provision: Without separating them from the royal patrimony I grant them to my subjects in property and possession in such manner that they may sell them, rent them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the mines belongs to them, on the same terms in which they themselves possess it, and to persons capable of acquiring it. Rockw. on Mines, p. 49; Halleck Coll. 222.

Discoverers of a new mine in which no pit or shaft had been opened might acquire three pertenencias, and if worked in com

pany a certain additional number not exceeding seven in all. Writers do not exactly agree as to what is a pertenencia, but the better opinion is that it is a square of two hundred varas, or five hundred and fifty feet. *Prima facie*, the owner of freehold lands, says Bainbridge, is entitled to all the minerals on and underneath the surface with the exception of royal mines, but he admits that the rule just stated is only a presumption of law, and that a mine may form a distinct possession and inheritance by the production of a title distinct from that to the surface. Bainb., p. 4. He also admits that when mines form a distinct inheritance and are not attached to the ownership of the lands in which they are situate, or form a part of a demesne of a manor, a title to them may be acquired or lost in the same manner as to a common estate of freehold. Bainb., p. 31. Property in minerals unsevered from the land, says Collyer, whether held together with or separately from the property in the land, is what the law terms a corporeal hereditament, as distinguished from the mere right to work for them, which is an incorporeal hereditament; and he also says that an estate in minerals is considered an estate in land, and is transferable *only* under the same restrictions, whether conveyed with or without a conveyance of the adjacent soil. P. 1.

4. Courts of justice also have had occasion to assert the same general principles. Plaintiff in ejectment was allowed, in *Turner* vs. *Reynolds*, (23 Penn. R., p. 199,) to recover a coal mine which he had described in his writ as land, although his title was under a conveyance to him, not of the tract of land, but of the coal which was unsevered. Coal and minerals in place are land, say the Court in *Caldwell* vs. *Fulton*, (31 Penn. R., 483,) adding in the same connection that it is no longer to be doubted that they are subject to conveyance as such. Minerals beneath the surface of the land, it is held in the same case, may be conveyed by deed, distinct from the right to the surface, and in enforcing that view the Court remark that nothing is more common in that State than that the surface right should be in one and the mineral in another, and we have no doubt that the rule there laid down is correct. *Comyn* vs. *Wheatley*, (Cro. Jac., 150.)

Regarding the claim to be fully proved as set forth in the petition, which is the proper view to take of the case in determining the question under consideration, we are of the opinion that the objection to the jurisdiction of the Commissioners cannot be sustained, and it is accordingly overruled. Rockw., chap. 11, p. 519–529; 530–532.

V. Having come to that conclusion, it becomes the duty of this Court to examine the third question presented for decision, which, is, whether the claim to the mine, including the mining right or privilege as set forth in the petition, is shown by the evidence to be a valid one within the rules of decision already described.

1. Property in mines not discovered, and registered according to law, whether the mine was on public or private lands, was vested, as has already appeared, exclusively in the Supreme Government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. Reference therefore must be made to those provisions to ascertain what they are and what the discoverer is required to do in order to acquire such a property. Persons discovering one or more mineral hills absolutely new, in which there is no mine or trial pit open, may, under article 1, title 6, of the ordinance, acquire, in the principal vein which they may select, three pertenencias, continuous or interrupted, according to certain prescribed measurements, and if they have discovered more than one vein they may have one pertenencia for each, to be determined and marked out within the term of ten days. Halleck Coll., p. 223, title 6, art. 1.

Discoverer of a new vein in a hill known and worked in other parts may have in it two pertenencias, provided he specifies them within ten days, as mentioned in the preceding article; p. 223, art. 2. Article 3 provides that he who asks for a new mine in a vein known and worked in other places shall not be a discoverer. Such persons as are described in the preceding articles who desire to secure the benefit of those provisions are required by article 4 of the same title to present themselves with a written statement before the Mining Deputation of that

Territory or the nearest one, should there be none there, stating in it their names and those of their partners, if they have any, the place of their birth, their residence, profession and employment, and the most particular and distinguishing feature of the place, hill or vein, of which they ask adjudication; all of which circumstances and the hour in which the discoverer presents himself shall be noted in a book of registry, which the Mining Deputation and Notary, if there be one, shall keep, and this being done, his written statement shall be returned to him attested for his due security. Notices are then to be affixed to the doors of the church, the Government houses, and other public places of the town for due information, and the command is that the discoverer within ninety days shall make or cause to be made in the vein or veins of his registry a pit or well (pozo) of one and a half varas in diameter at its mouth and ten varas deep, and that as soon as this shall be done, one of the deputies shall personally go, accompanied by the Notary, if there be one, and if there be none, by two assisting witnesses, and by the professional mining expert of that Department, to inspect the course and direction of the vein, its width, its dip or inclination to the horizon, called *lay or slope*, its hardness or softness, the greater or lesser solidity of its sides, and the kind or principal indications of the mineral, taking an exact account of all this in order that it may be added to the corresponding part of his registry, with the evidence of possession, which shall immediately be given to him in the name of the sovereign measuring to the party his pertenencias, and causing him, as required in the subsequent directions of the ordinance, to fix stakes in his boundaries. Following these regulations, and as the conclusion of the article in which they are contained, it is ordained to the effect that when all this is done "there will be delivered to him an attested copy of the proceedings as a corresponding title."

Contestants appearing during the ninety days may prefer a counter claim, and in that event it becomes the duty of the tribunal to adjudge the right to him who shall make the better proof, but no one shall have any right to be heard unless he

shall appear within that time. Halleck Coll., p. 224, arts. 4 and 5.

Strict compliance with the law is required, as appears by all the writers upon the subject, and the 13th article, of title 19, provides in effect that the regulations shall be executed with the greatest exactness, precisely as they are written and intended. Halleck Coll., p. 807; Rockw., p. 110; Thompson on Mines, 183.

Properly speaking, says Gamboa, the register is the book in which deeds and grants are entered for perpetual remembrance thereof, so that if they be lost, torn or defaced, or if any question be raised as to their identity or authenticity, recourse may be had to such book. Registry, says the same author, is the basis of a title to a mine, and the attributive cause of the subject's right of property in it; the Crown having subjected the proprietor to this obligation when he made the mines common, so that "no mine can be lawfully worked until registry is made, without which it is liable to be registered by any other person; the form of the ordinance not having been complied with." Although that commentary was written before the date of the ordinance which must furnish the guide in this case, still the views of the writer have an important bearing upon the questions presented, as showing the universality of the rule, that not even the discoverer can acquire any title to a mine without registry. Gamboa, pp. 143, 145.

2. Petition in this case was presented to the Commissioners on the 30th day of September, 1852, and on the 8th day of January, 1856, their decree was made, confirming the claim to the mine and to the entire mining right or privilege as therein set forth. When the petition was filed, the claimant, as required by law, also presented the documentary evidences of title on which he relied to show that the claim ought to be confirmed Throughout the whole period that the case was pending before the Commissioners, those documents appear to have remained on file as the foundation of the claim, and were finally urged upon the consideration of that tribunal as true copies of originals existing in the office of the magistrate before whom they

purported to have been executed. Final adjudication was made by the Commissioners and the claim confirmed upon that ground, and so far as appears, without the slightest suspicion that the copies filed in the case as documentary evidence under the Act of Congress were not true copies of originals on file as alleged, or that the originals did not import absolute verity. They of course regarded the documents as authentic, and considering how fully they are attested by official certificates, and that all of the signatures were thoroughly proved by the positive testimony of two witnesses, it is difficult to see how they could have come to any different conclusion, especially as there was no opposing evidence in the case. Additional testimony, however, of a very important character was taken upon the subject in the District Court while the case was pending there, and it now becomes the duty of this Court to decide the question upon a very different state of facts. Other parties it seems, besides the petitioner, are interested in this claim, and in order that the evidence may be understood, and the testimony of the witnesses properly appreciated, it becomes necessary to advert to the circumstances under which some of these parties acquired their supposed title.

According to the testimony, the mine is within the county of Santa Clara, and is situated in a spur of the Sierra Azul or Blue Mountain, some sixteen or seventeen hundred feet above the level of the sea, and fifteen miles southwardly from the city of San José. Discovery of mineral there was first made by the Indians at a very early period, and they were accustomed to obtain the mineral and use it for paint. Civilized men also had knowledge of the mineral and of the location of the mine more than twenty years before the discovery made by the claimant, but it no where appears that any one had discovered that the mineral contained quicksilver. Two persons, Antonio Suñol and Louis Chaboya erected a mill on a stream in that neighborhood some time during the year 1824, and tried to get silver out of the mineral. People generally knew that there was a mine there, but they did not know what kind of a mineral it contained. By authority of the Government the claimant, in the

autumn of 1845, made a journey to the fort of John A. Sutter, to negotiate with the proprietor for its purchase. Proceeding from Monterey, he and his party, consisting of José Castro and four others, besides a guard of some twenty soldiers, travelled on the route leading through Santa Clara, and his testimony shows that when near that place this mine was mentioned by his principal companion. While there, some of the specimens of the ore were shown to him, and one of the witnesses testified that he visited the mine. Some examination of the mineral was made by him at that time, but he presently left and pursued his journey to Sutter's fort, where he arrived on the 11th day of November, 1845. Remaining there but a short time, he then returned to Santa Clara, where he pursued his investigations by certain rude experiments, and discovered that the mineral contained quicksilver. His first step, as alleged, was to form a partnership for working the mine. Such an instrument bearing date the 2d day of November, 1845, is one of the documents which was filed with the petition. Original interests in mines are usually acquired under a division of the mine into twenty-four parts, called *barras* or shares, and by reference to the instrument of partnership it will be seen that it was framed upon that principle. Four shares were assigned to José Castro, four shares to S. and T. Robles, four shares to the Padre Real and twelve shares were retained by the claimant. They commenced working the mine in a small way, and the claimant remained there until some time in the month of March or April following, when he left for the City of Mexico and never returned to that Department. Affairs of the mine were left, at least for a time, in hands of the Padre Real.

On the 13th day of January, 1846, James Alexander Forbes, British Vice Consul for California, wrote to Eustace Barron, of the firm of Barron, Forbes & Co., at Tepic, that the claimant was working a quicksilver mine near the Mission of Santa Clara Alexander Forbes of the same firm and British Vice Consul a Tepic, on the 15th day of April, 1846, wrote to J. A. Forbes requesting the former to furnish him as correct information as possibl respecting the quicksilver mine mentioned in his pre-

ceding letter. Possession of the mine was, prior to the 22d day of September, 1846, delivered to James Alexander Forbes by the Padre Real, the agent of the claimant, as appears by the fact that on that day he wrote to Alexander Forbes, of Tepic, that he was in charge of the mine and was about making a bargain for four shares. Two shares were purchased by James A. Forbes of S. & T. Robles about the time he took possession of the mine. Arrangements were made with equal activity by Alexander Forbes to get control of the same property. On the 24th day of November of the same year he instructed his agent in the City of Mexico to purchase shares for him of the claimant, and on the 28th day of the same month he concluded with the agent of José Castro a contract for a lease or avio of the mine for the term of sixteen years, which term is not yet expired. His agent purchased five shares for him in the City of Mexico, and other shares were also purchased by James A. Forbes. Shares were also purchased by Robert Walkinshaw and other parties in the City of Mexico and elsewhere. Most or all of the deeds of conveyance, whether executed by the claimant, Castro, the Messrs. Robles, or the Padre Real, refer to the writing of partnership as the foundation of the title, and none of them make any reference whatever for any purpose to the supposed act of registry, or to the act of juridical possession supposed to have been executed by the Alcalde of San José Guadalupe.

8. Appeal was taken by the United States to the District Court on the 15th of April, 1856, and from that time to the date of the final decree the case was pending in that Court. Reasons for the appeal, as assigned by the United States, are that the claim is invalid, and that is the principal question that remains to be considered. Written notice was served upon the claimant by the District Attorney of the United States on the 18th day of August, 1856, to produce the original paper of which Exhibit A is a copy, to be used in the examination of witnesses. Exhibit A comprises the documents filed with the petition as copies of originals on file in the proper office of the Alcalde Claimant accordingly produced the document which is the one denominated Exhibit R. No. 2, in the record. Recurring to the

document it will be seen that while it has all the certificates appended to it which are described in the copies filed with the petition, still it shows to a demonstration that the copies were neither faithful nor to the letter, as was well said by the District Judge when his attention was first called to the subject. Certificate of James W. Weekes is one of the number of certificates appended to the document. When produced it was shown to him while he was under examination as a witness, and upon being asked whether he had ever seen the paper before, he answered that he had, and that the signature to the certificate was his signature. At first he seemed to suppose that it was a copy of what remained in the archives at that time, but immediately stated that he himself recorded it in the book of registry, and that he received the document which he so recorded from James Alexander Forbes. He was appointed Alcalde in 1848, and he expressly states that the person before named brought the paper to him and requested him to record it, and that he did so while he was Alcalde. Original document was presented to the witness, as he states, by J. A. Forbes, and the copy was also made by him, showing that the witness not only made the record without any other knowledge of the paper than what he received from his employer, but that he also signed the certificate certifying that it was "a faithful copy made to the letter from its original," without ever having compared it with the paper presented, and when in point of fact it was not a true copy. Examination of James W. Weekes took place on the 18th of August, 1857, and on the 14th of December, in the same year, James Alexander Forbes was also examined by the United States upon the same subject. His testimony fully confirmed the statements of James W. Weekes that the copy was made on the 20th day of January, 1848, and that the certificate of the Alcalde, as well as the body of the instrument, were in his own handwriting, showing that all the Alcalde had to do in the matter was to affix his signature to a paper already prepared. Witness last named thinks he prepared the copy at the mine; and he states positively that he obtained the paper which he used as the original from Alexander Forbes who was then at

the mine. Pressed to explain where he got certain words appearing on the first page of the document, he frankly admitted that he did not know, and finally stated that he copied the paper that was handed to him by his namesake and associate in that business. Attempts were made to impeach this witness, but his material statements are so fully confirmed that it is unnecessary to reproduce the evidence in that behalf. Unmistakable proof therefore is exhibited that the adjudication of the Commissioners was based upon documents which were fabricated, and it follows as a necessary consequence that the claimant, when he filed his petition, did not comply with the provision of law which required him to present to the Commissioners the documentary evidences relied on by him in support of his claim. Those papers, strictly speaking, are denominated the registry, the act of juridical possession and the writing of partnership, but the counsel at the bar have treated the entire document as an espediente, and as that is a convenient designation, it will be adopted in this investigation.

4. Espediente No. 1, called by the Attorney-General the Weekes' espediente, must be rejected as invalid. Certain characteristics of the paper, however, should be noted in addition to those already mentioned, in order that the other documents subsequently introduced may be compared with it as a test of their verity. Caption and indorsement as translated are "year 1845. Espediente of the denouncement, possession, and partnership of the quicksilver mine called Santa Clara, jurisdiction San José Gaudalupe, in upper California." Contents are: 1. Petition of claimant announcing the discovery of a silver mine with ley of gold. 2. Supplementary petition stating that besides silver and gold he had taken out liquid quicksilver. 3. Act of possession signed by Antonio M. Pico. 4. Receipt of same for fees amounting to $25. 5. Writing of partnership. Date of act of possession is Juzgado of San José Gaudalupe, December 30, 1845. Articles of partnership are for a mine of silver, gold and quicksilver, and are dated on the 2d day of November, 1845, some twenty-five days before quicksilver was discovered.

Noting these characteristics as proper to be considered in

connection with those previously mentioned, we dismiss the document as wholly unworthy of credit.

5. Second espediente, called the Fernandez espediente by the Attorney-General, is the one introduced by the claimant on the 6th day of November, 1857, when José Fernandez was examined a second time as a witness. His first examination was on the 28th day of March, 1855, while the case was pending before the Commissioners. No such espediente was exhibited then, and no inquiries were made of the witness upon the subject. Request was made of the witness on this last occasion to look at the document shown him by the claimant and say whether he knew in whose handwriting it was, and whether the signatures of Pedro Chabolla or Chaboya appearing thereon were genuine. Answer of witness was, that the document was in the hand writing of Salvio Pacheco, and that the respective signatures of Chabolla were genuine. Other documents were then shown to the witness, and upon being asked whether the signatures were genuine, his answer was in the affirmative. Those documents are as follows: 1. Petition of José Castro, dated the 27th day of June, 1846, addressed to the Alcalde of first nomination of the Pueblo of San José de Gaudalupe, in which, among other things, he solicits three pertenencias for himself and associates in addition to those previously conceded, and requests that the petition may be attached to the former espediente. Margin of that paper contains an order signed Pacheco, and dated Pueblo of San José Gaudalupe, June 29th, 1846, as follows: Let this be included and archived as the party requests. 2. Claimant's two petitions in respect to the registry of the mine. 3. Alcalde's act of possession, which is dated Juzgado de San José Gaudalupe, December, ——, 1845. Signatures to the act of possession are Antonio Ma. Pico with Antonio Suñol and José Noriega as assisting witnesses. Separate certificates of Pedro Chaboya are appended to each of those papers. Three of the certificates are without date, but the one appended to the act of possession is dated on the 13th day of August, 1846. Writing of partnership, so called, is wanting in the espediente, which came from the hands of the claimant. Although Pedro Chabolla was

examined as a witness by the claimant, still no questions were asked him respecting this document. Testimony of Salvio Pacheco shows that the whole body of the instrument is in his handwriting, but he omits to state from what he copied it, and fails to give any explanation upon that subject. He says he is acquainted with the signature of Pedro Chaboya, and that his signatures to his certificates are genuine, but he did not see him sign his name, and does not state how he became acquainted with his handwriting. Signer of the certificate testifies that he could not write, that he could only "paint his name," and that it was with great difficulty that he could read any kind of writing. Caption of the document is No. 1, and it is endorsed "Diligencias en el Registro," which signify that it should be promptly registered. Receipt of Antonio Ma. Pico, as shown on espediente No. 1, is wholly wanting in this document. Considering that the signer of the certificates could not write or read writing, and has not been called as a witness to verify the document, it is entitled to very little consideration. Circumstances, however, will render it necessary to recur to this paper again after referring to certain other documents introduced by the claimant.

6. Espediente No. 3, called by the Attorney-General the Halleck espediente, is endorsed as filed in the case, on the 30th day of January, 1858, but it is certain that testimony respecting it was introduced at an earlier date. Deputy Recorder of Santa Clara County was examined by the United States in respect to a similar paper on the 18th day of August, 1857, but insisting upon his right to retain the document, a traced copy of it was made, and on the twenty-ninth day of the same month, the copy was filed in the case by the United States. On the 23d day of October following, another Deputy Recorder of that County was examined by the claimant in respect to the same or a similar document. Exhibiting a document, entitled "Posesion de la mina St^a. Clara, año de 1845," he stated that he obtained it from the office of the Recorder. Enquiry was made of him when he went into that office, and whether he did not, in 1852, see there the document produced. His answers were that he had the entire charge of

the office from the fall of 1852 to the summer of 1853, but that he had no recollection of seeing the document there during the first year. Explanations were then given by the witness, in which he stated that the first recollection he had of the document was a few days before the date of the filing on the back of the paper, which is as follows: "Filed February 25th, A. D 1853, at 12 o'clock. A. M.—J. M. Murphy, Recorder, by S. C. Houghton, Deputy," who is the witness; and he goes on to say that just previous to that time, James A. Forbes called at the office of the Recorder, and after describing the paper, desired to see the record of it. Search was accordingly made by the witness, but he could find none such there, although he says that he and the applicant searched for it more than a day. What the party was looking for, says the witness, was the record of the paper and not the paper itself, but they could find nothing of the kind, although the search was thorough and faithful.

Unsuccessful though they were at that time, still the desired document, in the course of a few days, was found there without any further search; for the witness states that some days after that, he found the paper in the office, either in the top of his desk or one of its pigeon-holes, and he says that he was surprised that it should be there without his knowing it, but having found it, he kept it safely until the party who inquired for it came, and it was then filed at his request. Attention is called by the claimant to the fact that there was written in pencil on the back of the paper, as follows, "Filed 3 o'clock, P. M., 18 January, 1851—J. T. Richardson, Recorder, S. C. C.," but in view of the circumstances which surround the paper the fact referred to cannot have much weight. Pencil marks could be added to the filing quite as easily as the paper itself could be foisted into the pigeon-holes in the desk of the Recorder. Interrogatories were also propounded to H. W. Halleck in respect to that document, and the time when it was deposited in the office of the Recorder of Santa Clara County.

Speaking of the document, the witness said he thought it to be the one taken by the Mayor, "in my presence," from his office, and transferred to the office of the County Recorder in the

winter of 1851, during the session of the Legislature, and he thought in the month of January of that year.

Recollection of witness is that he first went to the office of the Recorder for a copy of the papers connected with the mine, but was told that the greater portion of the old Alcalde papers were in the office of the Mayor. Learning that fact, he went to the latter office, where, on overhauling certain old papers in an old desk, he found this one among them. Witness, as he states, only remembers the papers he found there from the general subject-matter of its contents, as purporting to be an original paper, containing the denouncement and juridical possession of the mine. Document embracing a copy of espediente, number one, was shown to the witness, and he was asked whether it was not a copy of the one he found in the office of the Mayor; to which he answered, that he could not remember whether it contained the same papers as that, more or less. Obviously the recollections of the witness upon the subject are very imperfect and indistinct, and consequently his statements are so qualified and so far short of positive declarations that they can hardly be regarded as evidence. Indistinct, however, as the recollections of the witness are, still it is evident that he regards the paper as the original denouncement and juridical possession of the mine, because he says so in answer to the direct interrogatory put to him by the United States, but his opinion in that behalf cannot be regarded as satisfactory proof of the fact, especially when considered in connection with his previous answers as to his means of knowledge and the state of his recollections.

7. Those interested in the mine could not have believed on the 18th day of December, 1850, that any such original document, or duly authenticated copy thereof, was in the State of California, as is evident from the affidavit of their counsel, signed and sworn to on that day. Suit had been commenced in the County Court, by the widow and heirs of José Reyes Berreyesa, against all of the persons in possession of the mine, to recover possession of a certain tract of land, including that in which the mine was situated. Defendants were Isidoro de la Torre, of Mazatlan; Alexander Forbes, William Barron, and Eustacho Barron, of Tepic,

John Parrot, of San Francisco; and James A. Forbes, and Robert Walkinshaw of the County of Santa Clara. Court granted a rule on the 18th of September, 1850, requiring defendants to produce "certain papers or copies thereof," to be used in the trial of that cause. Among those specified in the motion were certain papers of a pretended denouncement of the mine in 1845. Papers were not produced, and the affidavit of the counsel was filed to support a motion for a continuance. Affidavit stated to the effect that the original denouncement of the mine of New Almaden, and the act of juridical possession given of the same in the year 1845, were held by parties in Mexico, which had not then been received, although the defendants had exercised all due diligence to procure and produce them.

Referring to the contents of this espediente, it will be seen that it contains: 1. Petition of José Castro, already described. 2. Petitions of claimant. 3. Alcalde's act of possession.

None of the certificates exhibited in the other espedientes are to be found in this document. Testimony was adduced to show that the several papers were genuine, and the witnesses most relied on for that purpose were José Castro, Antonio Ma. Pico, together with Antonio Suñol and José Noriega, the two assisting witnesses to the act of possession. Full proof was exhibited that no one of the papers was written by the person or persons who signed it, and it was satisfactorily shown that each paper was in a handwriting different from all the rest. Satisfactory proof also was exhibited that the petition of José Castro was in the handwriting of Benito Diaz, and he testified that he wrote it five or six months after our conquest of that Department. Writing of partnership, and the receipt of Pico for his fees are both wanting in this document. Caption of the document is: "Posesion de la Mina de Sta. Clara, año de 1845," and the act of possession is dated Juzgado de San José Guadalupe, December —, 1845.

8. Two inventories, purporting to contain a list of documents in the Juzgado of San José, were also introduced. Included in the schedule of the first one, which is dated on the 2d day of January, 1846 is the following: posesion de la Mina de Sta.

Clara, a D. Andres Castillero; but the second, which is dated on the 10th day of November of the same year, shows no trace of any such paper. Testimony of H. C. Melone should also be noticed in this connection, as he was the first clerk of the Alcalde's Court, under our military occupation. His statement is, that he never saw the document or heard it spoken of, although he had occasion to examine the papers there, one by one, in order to select such as should go to the office of the Recorder from such as he was required to keep as county clerk.

9. Fourth espediente is the one called the Walkinshaw espediente by the Attorney-General, and is the last of the series introduced by the claimant, as the documentary evidences of his title, to the mine and mining right, or privilege described in his petition. Contents of the espediente are as follows: 1. Petitions of the claimant, as in the first espediente. Appended to each is also a certificate of Pedro Chabolla, dated the 18th of January, 1846, certifying that the petitions respectively were copies of originals, and each certificate purports to have been signed in the presence of P. Sansevan and Jose Sufiol, as assisting witnesses. 8. Pico's receipt for twenty-five dollars as fees. Introductory part of the receipt corresponds to that in the first espediente, but he also describes the mine as one "*in lands pertaining to Don José Reyes Berreyesa.*" Castro's petition and the writing of partnership are both wanting, and there is no certificate of Pedro Chabolla appended to the act of possession or any certificate of any kind. Another peculiarity of this document consists in its caption, and as that part of the paper is of considerable importance in the investigation, it will be given without abbreviation. It is as follows:

"YEAR 1845.

"*Espediente of the Denouncement, Possession, and Partnership of the Quicksilver Mine called Santa Clara—Jurisdiction of San José Guadalupe, in Upper California.*

"November 22, 1845.—Don Andres Castillero makes the denouncement of the aforesaid, in the Pueblo of San José Guadalupe, for want of Deputation of Mining and of Judge *de letras.*

"December 8, 1845.—Writing which the said Castillero presented, testifying to have taken out quicksilver and other metals, asking that it be annexed to the espediente.

"December 30, 1845.—Act of possession, which, with the assisting witnesses, the Alcalde of the Pueblo of San Jose gave to Don Andres Castillero, of the mine of Santa Clara, because of the time of the notices being completed.

"December 30, 1845.—Receipt for the fees of the possession, signed by the Judge of San José.

"December 8, 1845.—Writing of partnership for the works of the mine, authorized by the Prefect of the 2d District."

Partnership of the quicksilver mine is one of the matters enumerated in the title of the caption, and the writing of partnership is one of the documents circumstantially described in the last article of the same. Espediente produced, contains no such paper, and the inference is a very strong one that it has been spoliated by some one having an interest to suppress the missing paper. Description of the paper, as exhibited in the last article of the caption, gives the date as of the 8th day of December, 1845, which is a very material variation from the other copies presented in this record. Discovery that the mineral contained quicksilver, notwithstanding what is stated in the articles of partnership, was not made until late in November, 1845, after the claimant returned from Sutter's Fort. Articles of partnership, as exhibited in the first espediente, were dated before the quicksilver was discovered, and yet the discovery, as set forth in that document, was described as of a mine of silver, gold, and quicksilver, which inconsistency tended strongly to impair confidence in the entire espediente. Petition had been pending nearly eight years when this espediente found its way into this case. First espediente was filed on the 30th day of September, 1852, and this one was filed on the 17th day of July, 1860. Time enough, certainly, had elapsed to enable a party to examine and ascertain what, if any, contradictions or inconsistencies appeared in his proofs, and to give him an opportunity to employ all proper means to obviate any such difficulty. Produced, as this document was, at so late a stage of the litigation,

it must be held that the burden of proof is upon the party producing it, not only to establish the authenticity of the paper, but to do so by clear and satisfactory evidence. On the 27th of July, 1860, Pedro Chabolla was examined in respect to this espediente. Inquiry was made of him, whether his signature and those of the assisting witnesses were genuine, and upon looking at the document, he answered both questions in the affirmative, although he admitted, in the same deposition, that he never learned to write, and that it was with difficulty that he could "paint his name." His account of the matter was, that the papers were brought to him from the mine; and he says he signed them because he was requested to do so; and when asked how he knew the papers were correct, his answer was that he did not examine them, adding that "it was not for me to do that." One of the assisting witnesses, José Suñol, is dead; but the other, Pedro Sansevan, was examined, and confirms the statements of the preceding witness as to the genuineness of the signatures; but two witnesses examined by the United States, testified, without qualification, that the witness had previously stated to them that he signed the documents in the year 1848, and that they were copies.

Theory of claimant now is, that espediente No. 8 is the original filed in office, and that the espediente under consideration was a duplicate executed at the same time and delivered to the party. Three witnesses, Antonio Ma. Pico, Antonio Suñol, and José Noriega, were recalled and examined to prove that the document was executed in duplicate. They stated nothing of the kind in their first examination, nor did they do so in their second depositions. When called for the third time, after the fourth espediente had been discovered and introduced, the witness first named said that the document was signed on the day of its date, and he had no doubt he delivered it to the claimant; but the other two witnesses were less positive, and were only able to say that they supposed the document was signed at its date. Learned counsel admit that the theory in this behalf was started at rather a late stage in the investigation, but endeavor to excuse the claimant upon the ground that

the fact was unknown to his attornies, and that his witnesses did not remember it. Attorneys are certainly without fault, and so are the witnesses, unless they have finally attempted to remember what never occurred, which, from all the circumstances, there is too much reason to fear.

Parties holding large and valuable interests in real estate are generally careful to secure title papers which are supposed to be correct in form, and their solicitude and vigilance in preserving them are more or less active, according to their importance and the magnitude of the interest involved. Contrary to what might have been expected, as shown by experience, the claimant in this case, and those holding under him lost all the original title papers to the mine, although the espediente, as they allege, had been executed in duplicate, and the mine and mining right or privilege were of incalculable value and importance. Fortuitous circumstances artistically described in the testimony, led, it seems, according to the theory of the claimant, to the discovery of the third espediente, called by his counsel the original, in the depository where it belonged, and where every one who made any enquiries upon the subject must have known that the papers of the Alcalde's office had been deposited.

10. Impressions still prevailed, as the claimant represents, in the minds of those interested in the mine that there was somewhere in existence a duplicate original, but all enquiries and search for it had proved ineffectual until the time when the fourth espediente was discovered under the extraordinary circumstances detailed in the record. Those circumstances are well described by the witness, Thomas Bell; and inasmuch as they were even more fortuitous than those under which the third espediente was discovered, it may be well to allow the witness to state them in his own language He was examined on the 17th of July, 1860, the day this last espediente was filed. Witness says:

Some time, about three weeks ago, at the request of Mr. Billings, I was looking for the documents relating to the barras in the mine of New Almaden, which at one time had belonged to Padre Real; not finding one of the documents which I was in search

of among the papers of the mine, I asked Mr. Young to get the box containing the papers relating to the estate of Walkinshaw to see if it could not be found there. He produced the box, and then we proceeded to overhaul the papers. I saw a bundle marked—"Papers relating to the disputed barra," which I opened, and in looking over these papers I found one endorsed "Titles of Mines." I was struck with the antique appearance of the paper, and knowing that it was suspected that Walkinshaw had had documents relating to the Almaden mine in his possession, after glancing over the papers, I took them to the office of Messrs. Peachy and Billings, to ascertain more particularly their nature. It was then discovered that it was an espediente which they had been anxious to obtain for a long time.

Explanation of the transaction as given by the claimant is, that Robert Walkinshaw, the undisputed owner of two shares in the mine, brought suit against Bolton, Barron & Co., to establish his right to a third share claimed by him on which the defend ants refused to pay him dividends. He employed counsel and gave him certain papers which the counsel, who is now one of the counsel in the case, retained in his possession from January, 1853, when he was employed to bring the suit, until May, 1858, when he returned them to his client who gave him a receipt for the papers. Receipt is dated on the 14th of May, 1858, and the first paper named in it is a document in Spanish, headed "Ano de 1845, Espediente de denuncio posesion y compañia de la Mina de Azogue nombrado Santa Clara, jurisdicion de St. José Guadalupe, en la Alta California." Five pages writing and certificate, endorsed "Titles of Mine."

Day after the date of that receipt the party signing it sailed for Scotland, where, in the following August, he died. Document remained among the effects of the deceased in the care of his son-in-law and the executor of his estate until it was brought to notice in the manner already described.

Deposition of the son-in-law, who was the executor of the estate, was also taken by the claimant. He confirmed the statement of the preceding witness, but adds that he had previously

examined the papers of the deceased in search of documents relating to the title of the Almaden mine without any such success. Where the box had been kept, and whether so situated as to be accessible to other persons or not, the witness does not state; but he does state that the decedent before he left the country handed him the documents found in the bundle, and that he enveloped them "in a piece of paper" and labelled the envelope.

His search on the former occasion, as the witness admits, was especially directed to find the testimonio of the act of juridical possession, but he made no such discovery at that time. First search, as in the matter of the third espediente, was unsuccessful, but the second was attended with no difficulty. Such a discovery at that stage of the controversy was doubtless thought to be an acquisition as valuable as it was unexpected, and if the document could be regarded as an authentic paper, free from suspicion, the claimant and those holding under him, in one aspect of the case, might well be of the opinion that its importance could hardly be over estimated.

Assuming the other espedientes to be genuine, still the evidence in regard to them, even if viewed according to the theory of the claimant, showed conclusively that article 4, title 6, of the Mining Ordinance had not been complied with, because it was conceded that no attested copy of the proceedings had been delivered to the acquirer of the mine as "a corresponding title." When he filed his petition before the Commissioners, he also filed copies of the first espediente. Both the copies and the original, subsequently produced, represented that the act of juridical possession contained the day of the month on which it was executed, and besides the document embraced the receipt of the Alcalde for his fees and two certificates of Pedro Chabolla dated on the 18th of January, 1846, appended to the two petitions of the claimant. Those particulars were all wanting in the respective documents subsequently introduced. Favorable adjudication under such a state of facts could not rationally be expected, unless these glaring inconsistencies could be explained, because their effect was not only to impair all confidence in those docu-

ments, but also to discredit all the witnesses who, under oath, had verified the first espediente and the several papers of which it was composed.

Mention is made of these circumstances as showing the urgent necessity there was for additional proof and the corresponding inducement to commit fraud by fabrication and forgery. Counsel of the claimant admit in their brief that from the time James A. Forbes was examined as a witness in relation to the first espediente, until May or June, 1860, it remained inexplicable, whence came the word thirty in the date of the first copy of the act of juridical possession, whence came the copy of the receipt of the Alcalde for his fees, and whence came the copy of the two certificates of Pedro Chabolla which follow the respective petitions of the claimant. All these were found in the copy produced and filed as the first espediente, and up to that time had been treated by the claimant as parts of a genuine document. "Whence they came," say the counsel, "was the mystery," but their theory is, that the mystery was solved by what they now call the duplicate copy of the act of juridical possession, and in support of the theory they suggest, that it had long been supposed that such a copy must have been delivered by the Alcalde to the claimant. Suggestions were also made as to the mode in which Robert Walkinshaw might have become possessed of the supposed original document; but it is a sufficient answer to all these suggestions to say that they are founded on mere conjecture, are not supported by the evidence, and have little or no foundation in the probabilities of the case. Production of that espediente, say the counsel, "furnished the means of bringing in the testimony of all the witnesses concerned in (its) preparation who were yet living." Accordingly those witnesses who were called for the third time and re-examined, and although in their former depositions they had uniformly spoken of the espediente supposed to have been executed before the Alcalde in the singular number, without any intimation in respect to a duplicate, yet at last, after the petition had been pending nearly eight years, they were, as they state, able to recollect that a duplicate was executed at the same time

and delivered to the claimant, but their recollections upon the subject are by no means as distinct as they were on a former occasion they testified to the effect that the first espediente was a genuine document. Such testimony under the circumstances, is not entitled to credit, and such theories as those set up in respect to the supposed existence, loss and discovery of the third and fourth espedientes as genuine original documents are too speculative, sound too much in fiction, and are too thoroughly saturated with improbability to receive credence in a Court of Justice.

11. Frequent reference is made by the claimant in this connection to the evidence adduced as to the proceedings of the *Junta de Fomento* and other Departments of the Supreme Government, as tending to confirm the testimony introduced to prove the genuineness of these documents, and it may be conceded that the evidence referred to has some indirect bearing in that direction, but it must be borne in mind that no one of those documents, nor any part thereof, was ever submitted to those Departments, or to any one of them, and it is by no means certain that the officers of those Departments, or any one of them, ever heard that any such documents had been executed. They had doubtless heard what the claimant had stated in his communication to the *Junta de Fomento*, but there is no evidence to show that they had ever heard any thing more than that in respect to any of the supposed proceedings of the local authorities upon that subject. None of the documents were presented to them by the claimant, and of course there could have been no action in respect to their genuineness, which is the question now under consideration. Arguments which confound the question as to the genuineness of the documents, supposed to have been executed before the Alcalde, with the question of confirmation by the Home Government, afford very little aid in the decision of the case, and, in point of fact, are entitled to no weight, because their effect, if any, is to mislead.

Strong, however, as our impressions are that the evidence fails to show that any one of the four espedientes, introduced by the claimant, is entitled to credit, still we are disinclined, in view

of the great complication of the evidence upon the subject, to rest the decision of the case upon that ground.

VI. Two other principal objections are made to the confirmation of the claim:

First. It is insisted by the United States, that it is not shown by competent evidence, that a public tribunal, empowered by law to take jurisdiction over the subject-matter of the acquisition of a mine, or mining right, or privilege, has ever acted in this case, and adjudicated to the claimant the title to the mine, as alleged by him in the petition.

Secondly. That if such a tribunal is shown by competent evidence to have taken any action in the case, still it does not exercise its special and limited jurisdiction in a manner required by law so as to constitute or evidence any title to the mine claimed by the petitioner.

1. Mines under Mexican laws, as before explained, whether situated in public or private lands, belong to the Supreme Government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the provisions of the 4th article of the mining ordinance as herein previously recited. Applicant must resort to the proper tribunal and present his written statement, specifying in it his name and the names of his partners, if he has any, the place of their birth, their residence, profession and employment, and the most particular and distinguishing features of the place, hill or vein, of which he asks adjudication. The title to such properties are acquired by the citizen or subject wherever Spanish law prevails by the adjudication of the proper tribunal having jurisdiction of the subject-matter. Contrary to what is supposed by the claimant, is the *adjudication*, or decree, of the proper tribunal in a case duly presented for decision, and the registry of the adjudication together with the proceedings on which it is founded, which vest the title in the applicant, and not the mere fact of discovery as was supposed at the argument. Without proof of discovery by the applicant, there can be no adjudication in his favor, but the discovery of a mine, by a party in whose favor there has been

no adjudition by a tribunal having jurisdiction of the subject-matter, secures no right or title to the discoverer. Boundaries also must be fixed to carry the adjudication into effect or rather to complete it, else the title or claim, like other indefinite and uncertain interests in lands, will be void for uncertainty. Marking of boundaries also is essential under all circumstances, whether the mine is situated in public or private lands, for if the location is in public lands, compliance with the requirement is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership.

2. Public convenience, therefore, in such a case requires that the boundaries should be fixed, and, besides, unless the limits of the pertenencia were fixed and staked, or monuments set, other tribunals, whose duty it is to adjudicate lands to applicants for agricultural purposes, would be subjected to embarrassment and be led into error. Definite limits also to mining rights or privileges are equally necessary and important, where the same happen to be located upon the lands of private individuals, in order that the land owner, as contradistinguished from the owner of the mine, may have the means of knowing and be judicially notified, as to what portion of his land has been condemned and appropriated to the use of another.

3. Registry, also, is expressly required by the very article of the mining ordinance under which the party in this case claims title to the mine, and it is a great error to suppose that a compliance with that provision is shown by proving that sheets of paper, not executed at the same time, but assumed to constitute an espediente, were at some time placed in the office of the Alcalde and remained there for a time in one of the pigeonholes of his desk. Such a suggestion is destitute of any foundation. On the contrary, the requirement is in express terms that the statement of the discoverer, together with the time when he presented himself, "*shall be noted in a book of registry*, which the deputation and notary, if there be one, shall keep, and in respect to the action of the tribunal on the application, the provision is that an exact account shall be taken" in order that it may be

added to the corresponding part of the registry with *the evidence of possession*, which shall immediately be given. Act of possession, therefore, is to be added to the registry, together with the action of the tribunal on making the adjudication; and they are both required to be noted in a book (Libro) of registry.

4. Strict compliance with that provision is required as matter of public policy, because the mines of a country like Mexico are a great sources of revenue to the Government, and because it tends to prevent disputes and litigation; prevent fraud and false swearing; secure such rights of property, and promote order and a good understanding among miners holding and working contiguous pertenencias. 1 Gamboa per H., pp. 143, 144.

The tribunal empowered by the mining ordinance to exercise this jurisdiction was "the Deputation of Mining" for the territory or district where the mine was situated, or the nearest one thereto, should there be none there. Halleck Coll. 224. Former ordinances, especially that of 1584, on which Gamboa wrote, conferred the power of adjudicating such titles exclusively on the Mining Court within whose jurisdiction the mine was situated. Ord. 1584, art. 17, Gamboa per H., 139. Section 17th of that Ordinance also provided "that in case *such registry* be not made in the manner, and within the prescribed time, any person may register such mine, and shall thereby have and acquire the right which such discoverer or other person who might have required the registry, *would have had* if he had caused the registry to be made." Gamboa, p. 141.

5. Cases occurred under that Ordinance where mines were discovered in districts having no Mining Court, and in that state of the case there was no tribunal in the parent country which had jurisdiction of the subject-matter, and of course the matter had to be referred to the sovereign power, and to remedy the embarrassment arising under such circumstances from the want of a court to adjudicate such titles, it was provided, in the mining Ordinance of 1783, that the court "nearest thereto" should have jurisdiction of such a case. Parties concede that the ordinance last named was in force at the date of these proceedings, and unless it can be shown, (and the burden is upon him who avers

it,) that the provision referred to has been modified or repealed, it is clearly applicable to this case. Constitution of Mexico vested all the judicial powers of the Republic in one Supreme Court of Justice, and other courts and tribunals to be constituted in conformity to the instrument. Coll. Mexican Constitution; tomo 1, titulo 5, art. 123. Pursuant to that provision the Tribunal-General of Mining, on the 20th of May, 1826, was deprived of its powers. New regulations were then adopted, which were from time to time amended, but it is not important to notice those decrees, because on the 2d day of December, 1842, a new system, carefully digested, was put in force, the 4th article of which constituted and regulated the tribunals of mining. Halleck Coll., pp. 409, 424, 434, 441.

Among other things it provides for the creation of "Courts of the First Instance" in each Department, and for the mode of their election, and also provides that those courts, within their respective districts, shall exercise the executive, judicial, and economical powers given by the old ordinance. Halleck Coll. p. 441 title 4, art. 26.

6. Courts of the First Instance were never organized in the Department of California, and the argument of the claimant is, that in consequence of that fact the ordinary tribunals, as for example, an Alcalde could take jurisdiction over such a subject-matter, and on the application of the discoverer, could adjudicate the title. But the position cannot be sustained, because by the express law of the Republic, as evidence in the special decree of the 14th of January, 1843, it is provided that territorial deputations may continue to exercise their functions "until the Courts of First Instance * * are established." Halleck Coll., p. 448. Support to the position cannot be derived, as is supposed, from the fact that the law was so in some of the dependencies of Spain prior to 1783, because it is from the express terms of the Ordinance of that year that the Mining Deputation derived their exclusive jurisdiction over the subject, and inasmuch as the supposed analogy on which the position was based fails, the position must fall with it.

7. Mexican policy also, and administration in regard to that

Department, afford strong ground to conclude that no such power was intended to be conferred upon any of the officers of the Local Government. Those officers were a Governor, appointed by the Supreme Government, a Departmental Assembly, consisting of seven members, who were chosen by electors, but their election was subject to the approval of the Home Government.

Most of the important functions of the Local Government were performed by the Governor and the Departmental Assembly; but the law also made provision for the appointment of Prefects, who were to be nominated by the Governor and confirmed by the General Government; also, Sub-Prefects, who were to be nominated by the Prefects and approved by the Governor. Provision was also made for *Ayuntamientos* or Municipal Councils, whose ordinary members were elective; and also for the appointment of Alcaldes and *Juaces de Paz* or Justices of the Peace, whose numbers were to be fixed "by the Departmental Assembly, in concurrence with the Governor." Arrillaga, Recop., pp. 202, 214, 223, 230. Judicial functions were exercised by the Prefect as well as the Alcalde, and no reason is perceived for holding that the latter could adjudicate a mining title which might not be adduced with equal and even greater force to show that the same important duty might be performed by the Prefect; but the truth is, there was no law which gave either the one or the other any pretence of jurisdiction in any such matter Theory of claimant is, and so is the argument, that the jurisdiction must have been confided to some of the officers of the Department, and that the presumption is, that the Alcalde had jurisdiction, inasmuch as it is not shown that Courts of First Instance had been constituted and organized.

Giving the argument, however, its utmost force, it only shows that a law conferring upon an Alcalde such a jurisdiction would have been a convenience to the inhabitants, and especially to the claimant; but it has no tendency to show there was any such law, which is the question to be decided. Opinion is expressed by two or three of claimant's witnesses that an Alcalde might make such an adjudication, but they exhibit no law to that effect, nor do they attempt to prove there was any such general

usage; and inasmuch as their opinions are not competent evidence, their testimony may be dismissed without further remark. Authorities of Mexico had long dreaded the influence of foreigners in that Department, and although the policy of the Home Government was to promote the settlement and growth of the Department, still they had always manifested an unwillingness to confer any more power upon the Local Government than was necessary to accomplish those objects.

Mineral wealth, if discovered, would furnish a motive to attempt the conquest of the Department, and it may well be inferred that the authorities of the Home Government had determined to reserve the adjudication of titles to such important public interests to the Federal tribunals. Strong support to that view of the case is derived from the course pursued by those authorities when the land system of the Department was devised and put into operation.

8. Power to grant vacant lands was as early as the 18th of August, 1824, vested in the Governor, in concurrence with the Departmental Assembly. Additional regulations upon the subject were adopted on the 21st of November, 1828, which exhibit a system as complete and perfect as is to be found anywhere. Granting vacant lands for agricultural purposes was by no means regarded as a matter of so much public importance as the adjudication of titles to newly discovered mines. Those provisions and regulations confer very ample power upon the Governor to grant vacant lands in concurrence with the Departmental Assembly, but they confer no power upon them or upon any of the local authorities to adjudicate titles to mines. Grants of land made under those laws did not convey to the grantee the unsevered minerals in the soil or any interest in them, and there is no ground whatever to hold that the Supreme Government ever conferred upon any of the local tribunals any jurisdiction upon the subject under consideration. Authority of the Alcalde therefore, cannot be inferred from the fact of its exercise, or from the fact that no other tribunal of the Department was authorized to exercise such a jurisdiction.

VII. But if the Alcalde had power to take jurisdiction of the

subject-matter, still it is insisted by the United States in the second place that he had only a special and limited authority, and that he did not exercise it in the manner required by law. 1. His proceedings were based upon the written statement of the claimant, and that was upon its face exceedingly imperfect if not absolutely insufficient. Some of the provisions of the mining ordinance are doubtless merely directory, others may be regarded as conditions subsequent, but those appertaining to the registry of the mine, together with the action of the tribunal thereon, and in respect to the juridical possession of the same, are evidently conditions precedent; so that it is necessary, in order to support a title to such a right or privilege as a discoverer, to show that the party substantially performed those conditions. Unless a claimant shows a substantial compliance with those requirements the conclusion is inevitable, not that he has forfeited his right to the mine, but that he never acquired any such title. Forfeiture is of that which a party hath, but he cannot be said to have forfeited what he never had acquired, as the title to that which he had never acquired, must always have been in the State or in another person.

2. Nothing like forfeiture is pretended by the United States, and no such question arises in the case; but the proposition is, that the claimant never acquired any right or privilege in the mine even if he was the discoverer, because he did not, as required by law, pursue the necessary steps to give vitality to the inchoate privilege or pre-emption accorded to the discoverer to proceed according to law, and ripen such privilege or pre-emption into a perfect or complete right by a registry of that which he had discovered before the proper tribunal, and by securing the juridical possession of the same under a legal adjudication of the title. His discovery, and its registration, as is well said by the counsel of the United States, gave him a right, within ninety days to make an opening into the vein, and the further right to apply to the proper public authority and have that which he claimed to have discovered defined and set out to him and its boundaries marked, and a record made of his title to the defined pertenencias. When all this is done according to law,

the inchoate privilege or pre-emption of a discoverer so to proceed is then ripened into a perfect or complete right, and his title to the mine comes into existence.

8. Returning to the written statement which in this case is the petition of the claimant addressed to the Alcalde, and noting the representations it contains, it is clear that it is not a compliance with the requirements of the ordinance in many respects. Ordinance, for example, requires a written statement of the most particular and distinguishing features of the place, hill, or vein of which adjudication is asked, or of which he asks the grant, as the phrase is rendered in some of the translations. Representation in the statement or petition is, that he, the claimant, has discovered a vein of silver with a ley of gold "on the rancho of José Reyes Berreyesa, which was a hacienda of a league square, mostly table land, with disputed boundaries." Another requirement of the ordinance is, that the applicant shall give "the names of his partners, if he has any, and the place of their birth, their residence, profession, and employment;" and by article 6, of title 7, the discoverer is expressly forbidden to denounce a mine for himself having entered into a contract of partnership, and yet the claimant's petition which shows that there was a partnership, fails to disclose the names of his partners or any of the required particulars, and it also shows that he denounced the mine to himself alone.

4. Strong doubts are entertained whether the Alcalde, even if he had jurisdiction of the subject-matter, was authorized to proceed and adjudicate the title upon the basis of such a statement; but it is not necessary to decide that question, as there are two other defects in the proceedings which are fatal to the pretensions of the claimant. No such registry of the particulars concerning the mine, or of the action of the Alcalde upon the allegations of the petition, or of his proceedings in respect to the juridical possession of the mine was ever made, as is required by the provisions of the ordinance, nor were the pertenencias measured or definitely located, or the boundaries fixed, or the stakes set, as is therein required. Registry has been required as the basis of the title to a mine wherever Spanish law has pre

vailed for more than three centuries, and probably no case ever occurred within that period which more fully showed the absolute necessity for such a rule or more fully exemplified its wisdom than the case under consideration.

When the Alcalde was first called and examined in another suit concerning the proceedings before him, in respect to the registry of this mine, and the supposed juridical possession given of the same, he testified that the claimant applied to him to go and give him possession of the mine, according to the Mexican custom. Taking the account of the matter, as he then gave it, to be true, he went there with the claimant and others, and pointed out such boundaries as he thought the claimant ought to have; but he expressly stated, on that occasion, "that no fixed possession was given to him," for the reason that there was a dispute between him and José Reyes Berreyesa, on whose rancho the mine was situated.

Berreyesa, as the witness stated, would not consent that possession should be given unless the claimant would admit that he, Berreyesa, should have an interest in the mine, and as the claimant would not do that, he, the witness, did not give any fixed possession of the mine. Witness was three times examined in this case, and on two of the occasions, he was interrogated upon this subject. His statements are to the effect that he, with the claimant and others, went to the mine; that after they arrived there, he sent for José Reyes Berreyesa, the proprietor of the Rancho, and that he accordingly came to the mine; that he, the witness, made known to Berreyesa what it was that was proposed to be done; that at first he objected, but finally consented, and that he, the witness, delivered the possession to the claimant. They made no survey, fixed no boundaries, and set no stakes, and the witness expressly states that he had no idea whether the three thousand varas in all directions were to be laid out in a square or round; that a part of the tract only was to be located around the mine, and the residue on the public domain in that neighborhood.

6. Nothing was done on the land; and if the witness is to be believed, very little was said, except that he stated that he

delivered the three thousand varas in all directions to the claimant. During the examination he was reminded of his former statements upon that subject, and was requested to explain the differences, but his answer was that, according to his understanding, there was no contradiction between his testimony then given and the statement in the act of possession. Alcalde Antonio Mª Pico had a secretary by the name of José Fernandez, who was a witness in this case, and who was also the *escribano* of the Court, but the Padre Real expressed a wish that these documents, whatever they were, should be prepared by one Gutierrez, a teacher at the Mission of Santa Clara, which was a league or two from the Juzgado of San José Guadalupe. They were not, therefore, prepared by the Secretary of the Court, and all he knows upon the subject is, that two or three days after the party returned from the mine, the schoolmaster, Gutierrez, brought him the document, and said, "there, now, it is all finished, and here is your fee," giving him three dollars and a half, and "so," in the language of the witness, "the document remained in the Court," but he expressly states that he never read it, or examined it and when asked by the United States what he did with it, he answered: "It remained there in Court. I did nothing else with it."

Other witnesses were examined upon these topics, but the statement given contains the substance of the evidence on both; and all the witnesses agree that there was no survey, no stakes set, and no boundaries marked in any manner. On this state of the case, it is insisted by the United States, that the acts of the Alcalde were absolutely void, but the claimant insists that even conceding the irregularities to have been such as represented, still that the acts of the Alcalde were not absolutely void, but at most only voidable, and that they were afterwards ratified and confirmed by the Supreme Government.

7. Reliance, it is proper to remark, is placed by the claimant upon the evidence of ra ification, as affording a sufficient and complete answer to all the objections taken to the claim made by him to the mine. Examination of that evidence, as exhibited in the copies of documents, introduced as true copies of originals

on file in the Departments of the Supreme Government, has already been so fully made that a brief reference to it in this stage of the investigation will be sufficient.

Statement of the claimant in his communication to the *Junta de Fomento* is, that he had discovered a mine of quicksilver in the Mission of Santa Clara; that he had denounced and taken possession, not only of the mine, but also of an extent of three thousand varas in all directions, that he had formed a company to work it, had constructed the pit, and had complied with all the conditions prescribed by the ordinance. Required, as he was, to make the representation in writing, it was of course prepared with deliberation; and yet he falsely states that the mine is situated "in the Mission of Santa Clara," and suppresses altogether the fact stated in his petition, and repeated in the act of possession, that the mine was situated on the rancho of José Reyes Berreyesa.

He refers to none of the documents, and none were produced, and this remark applies as well to his seventh proposition as to his representations in the preliminary part of his communication to the Junta. They adopted his seventh proposition, and recommended to the President, through the Minister of Justice, that the possession given to the claimant by the local authorities, as he represented, should be confirmed. Two accounts are given, as to what was the action of the President on the occasion. First, in the dispatch of the Minister of Justice, and secondly, in that of the Minister of Relations.

In the first, the language is, that the President "has been pleased to approve in all its parts the agreement made with (the claimant) in order to *commence the working of said mine*;" and in the second, the language is the same, except that the purpose of the agreement, as described, was "*to commence the exploration of that mine.*" Neither the one or the other contains a word which, by any proper construction, can be held to confirm the acts of the local authorities, or any of them, or to vest in the claimant any right, title, or interest in the mine. None of the documents, executed by the Alcalde were before the President, and it does not appear that he ever heard of them in any other

manner than by those vague representations, or others of a similar character. Action of the President evinces caution and circumspection, and the several communications, taken together clearly show that he did not act at all upon the seventh proposition of the claimant, or upon his representations in respect to the juridical possession of the mine; and there is nothing in the marginal order in any respect inconsistent with this view of the case, as it is evident that the purpose and intent of that order was accomplished in the contemporaneous dispatch of the Minister of Justice. Credence was evidently given to the representations that a mine had been discovered, and the President was willing that an advance of $5,000 or $6,000 should be made to the claimant to enable him to commence its exploration. Directions were accordingly given to approve the agreement to that extent, and to make the advance and furnish the retorts and other apparatus therein mentioned.

8. Second grants of land in the Department of California were seldom made by the Governors, and as the claimant already had one, he could hardly expect to obtain another without the special approbation of the Supreme Government. Hence his eighth proposition that a grant should be made to him, "*as a colonist,*" which was approved by the President so far as appears in the dispatch of the Minister of Relations already explained. Grants of that description conveyed no interest in the minerals, as was well known to the claimant; and in respect to the eighth proposition, the President was silent, evidently reserving that matter for further information and a more deliberate consideration. Irrespective, therefore, of the question of fraud, we are of the opinion that, by the true construction of the several communications, the claimant fails to show that the acts of the Alcalde have in any manner been ratified or confirmed by the Supreme Government.

It is clear, therefore, that the respective documents executed before the Alcalde must stand or fall, by what appears in the instruments, when considered in connection with the evidence, showing what was done at the time of their execution. Conceding full credit to the witnesses, and giving the utmost scope to their

testimony consistent with the language employed, still it is obvious from the claimant's own showing that he never made any registry of the mine, within the meaning of the provision requiring it to be made. Such a document cannot be said to have been registered, merely because it was handed to the Secretary of the Alcalde, before whom it was executed, and was for a time somewhere in the courthouse, especially when it appears that it was subsequently abstracted from the depository, if such it may be called, and was not returned to it for years afterwards, and then clandestinely and under circumstances of the greatest suspicion. Constrained as we are to regard the facts in point of view, the conclusion is inevitable that there was no legal registry of the mine, and the evidence is all one way to show that there was no survey of the nine hundred pertenencias granted, and no boundaries were fixed, and no stakes were set as required in the ordinance. Assuming, therefore, that the Alcalde had jurisdiction over the subject-matter, still, as it was but a special and limited authority, in order to give any validity to his acts he must exercise it in the manner required by law, and not having done so, his acts are void. *U. S.* vs. *Osio*, 23 How., p. 288; *U. S.* vs. *Castillero*, 23 How., p. 466.

VIII. Conduct of claimant throughout shows that he knew that he had no title as is plainly to be inferred from the fact that in the several conveyances made by him he never referred to the registry of the mine or to the acts of juridical possession supposed to have been executed before the Alcalde as the source or foundation of his title.

1. Whenever he referred to the source of his title he uniformly pointed to the writing of partnership. Sale of five barras or shares of the mine was on the 17th day of December, 1846 made by the claimant to Alexander Forbes, of Tepic.

2. Negotiations for the purchase and sale commenced on the 5th of the same month between the claimant and Francisco M. Negrete, the agent of the purchaser. Several interviews took place, but the negotiations were suspended to await the arrival of the Padre Ugenio McNamara, the agent of José Castro. He arrived from Tepic a short time before the contract of sale was

completed, and Negrete testifies that up to that time he had seen no other document than the writing of partnership, and no other had been mentioned. Padre McNamara brought with him the contract of lease or avio, which had been concluded between him, as the agent of José Castro, and Alexander Forbes.

8. Claimant approved the contract of avio, voluntarily putting into it his claim to the two square leagues of land. At the same time, also, he executed the conveyance of the five shares to the purchaser, but in none of these transactions was any mention made of the registry of the mine or of the act of juridical possession, leaving it to be inferred that the writing of partnership was the only document ever executed before the Alcalde, or certainly that there was no other, that the claimant thought proper to exhibit to a purchaser.

IX. Much stronger evidence, however, is exhibited in the record to show that the parties most interested in the mine, and who were engaged in working it, knew full well that the supposed title was invalid, as is fully shown by the correspondence between James A. Forbes and Alexander Forbes, or between the former and Barron Forbes & Company. More than forty letters between these parties are exhibited in the record.

Brief references will be made to such as have the most direct bearing upon the question under consideration, omitting all such parts as are not material to the inquiry, but preserving the substance. 1. Under date of the 5th May, 1847, James A. Forbes suggests to William Forbes, but evidently in reply to letters received from Alexander Forbes, that it is of the most vital importance to obtain from Mexico a positive, formal and unconditional grant of the two *sitios* of land conceded to the claimant according to the decree appended to the contract, and also an unqualified ratification of the juridical possession which was given of the mine by the local authorities, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverer. He also suggests in the same letter that the documents should be made out in the name of the claimant and his partners.

2. No letter is produced which is a direct reply to that com

munication. Record shows that Alexander Forbes visited California early in October, 1847, and it appears that he remained there until near the close of March, 1848, engaged, at least for a part of the time, in exploring the mine and in overseeing the prudential affairs of the Company. During that period other persons acquired an interest in the mine, and among the number were Barron, Forbes & Company, and they accordingly wrote to James A. Forbes, under date of the 11th of April, 1849, informing him that hereafter he might expect that the mine would be worked to the utmost of its capabilities of production. On the 20th of May, 1849, they wrote another letter to the same individual, saying in effect that from certain circumstances that he had mentioned it might be necessary to purchase some lands in the vicinity of the mine and hacienda of New Almaden, and authorized him to make such purchases, not to exceed in price the sum of $5000, as might be necessary to the secure possession of the mine and hacienda, or to effect such other arrangements as he might deem necessary for that purpose.

3. Seven days after the date of that letter, and before it was received, James A. Forbes arrived at Tepic, and while there left with Alexander Forbes the folllowing memorandum to be delivered to the claimant: "Very private." Memorandum of the documents which Don Andres Castillero will have to procure in Mexico.

"1st. The full approbation and ratification by the Supreme Government of all the acts of the Alcalde of the District of San Jose, in Upper California—in the possession given by the said officers of the quicksilver mine situated in his jurisdiction, to Don Andres Castillero, in December, 1845.

"2d. An absolute and unconditional title of two leagues of land to Don Andres Castillero, specifying the following boundaries:—On the north by the lands of the Rancho of San Vicente and Los Capitancillos; on the east, south, and west by vacant lands or vacant highlands.

"3d. The dates of these documents will have to be arranged by Don Andres, the testimony of them taken in due form, and

besides, certified to by the American Minister in Mexico, and transmitted to California as soon as possible.

"Tepic, May 27, 1849."

Proofs in the case show that the author of that memorandum returned to San Francisco, and on the 28th day of October following, in a letter to William Forbes, he again called his attention to the importance of his former suggestions as to the necessity of perfecting the title to the mine. In that letter he also referred to verbal explanations previously given by him to his correspondent and Alexander Forbes, and then proceeds to impress upon the mind of his correspondent the vast importance of securing from Mexico the documents comprised in the memorandum left with Alexander Forbes, when he was in Tepic, for the claimant. Two days afterwards he wrote again to Alexander Forbes, in which letter, among other things, he says to his correspondent, you will now readily perceive the great importance of my advice to you to purchase a part both of the lands of Cook and of the Berreyesas. You were of the opinion that this measure would not be necessary in view of the supposed facility of getting the title to the mine perfected in Mexico, and he complains that more than five months have elapsed since it was decided that the claimant should procure the necessary documents in that city, and that they have not been sent to him

4. His description of his situation shows plainly that he was in great want of the documents, because he says that on the one side he depended upon the precarious and illegal possession of the mine granted by the Alcalde of the District to the claimant, who was himself in reality the judge of the quantity of land given by the Alcalde; and on the other side, he says he was attacked by the purchasers of the same land declared by the claimant himself to comprise the mine. Evidently that letter was regarded as one of importance, for it called forth two replies, one from Barron, Forbes & Co., and one from Alexander Forbes. By the one first mentioned, he was informed by his correspondent that on the 13th of the same month they had enclosed to him a notarial copy of the grant of land made by the Mexican Government to the claimant.

They acknowledged therein the receipt of his letters, thanked him for his able conduct, expressed satisfaction in view of the document sent, that he had not been obliged to purchase the land of Berreyesa, but submitted the matter to his best judgment, requesting him, however, to keep in view, "that at all hazard, and at whatever cost, the property of the mine must be secured," adding, "Castillero, we expect, will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted." Recurring to the other letter, it will be seen that it was more guarded, but the writer recommends that his correspondent and agent should proceed, without fear of disapproval, or waiting for instructions, in taking such measures as shall preserve this valuable "negotiacion" from any risk from those unprincipled claimants who have lately given him so much trouble, or from any other proceedings that may take place.

5. Another letter, also, was written by Alexander Forbes to James A. Forbes, under date of the 1st of December, 1849, in which he stated that the copy of the grant of land made to the claimant was, by mistake, not the one meant to be sent; and he explains the difference, which was, that the one sent was directed at the foot to the Governor, but the proper one was directed to the claimant, and was deposited at Monterey. Explanation is also given as to the difference in the legal effect between the two documents, which was, as explained, that by the first one the delivery by the Governor was perhaps necessary, whereas the other, being addressed directly to the claimant, did not require that formality, nor was any other proceeding necessary, thus making it, as the writer affirmed, a better document than the greater part of the other titles for lands in that Department.

Having made these explanations, he then expressed the hope that the well known cleverness of his correspondent had already enabled him to find out the mistake; suggesting, but rather doubtingly, that the one previously sent should be withdrawn, and the second one substituted in its place; but presently, as if upon reflection, mentions another difficulty which might arise, and that was that the copy of the grant of the two *sitios* of land

inserted in the contract of lease or avio was also directed to the Governor, and in view of that fact he finally decided to send a copy of all the documents and leave it to the good judgment of his correspondent to make such use of them as he should think proper. Nothing need be remarked respecting the copy of the document last sent, except to say that if it was addressed to the claimant it was a forgery, as the whole evidence shows that but one dispatch upon the subject was ever issued by the Minister of Relations, and that was directed to the Governor.

6. Reference will next be made to another letter from Alexander Forbes under date of the 3d of February, 1850, which is also addressed to the same person as the preceding letter. Among other things the writer states that he has every reason to believe that the documents mentioned by his correspondent would be found in the City of Mexico, and as the claimant would return that way he had no doubt they would be procured. In another part of the same letter he also states that at present they think it may be the best plan "to get an authenticated copy of the approval of the Mexican Government of the grant of three thousand varas given by the Alcalde on giving possession of the mine," "as a doubt may be started whether the Alcalde, acting as the '*Jues de mineria*,' had a right to make this grant, yet if approved by the Government of Mexico, *before the possession of the country by the Americans*, there could be no doubt on the subject." * * * * * * *

Castillero says such approval was given, and that on his arrival in Mexico he will procure a judicial copy of it. This is the *plan* we shall adopt if we hear nothing from you to alter this resolution. Writing from the mine, James A. Forbes, on the 26th day of February, 1850, replied to that letter, and the importance of that reply makes it necessary to give a somewhat extended extract from it as disclosing the intent and purpose of the entire series. Speaking of the claimant, he says:

"He succeeded in obtaining the grant of two sitios to himself on the mining possession in *Santa Clara*, while that very act of possession declares that the mine is situated on the lands of one José R. Berreyesa, five leagues distant from Santa Clara, and

you will at once perceive that such a discrepancy would not fail to attract the attention of United States Land Commissioners and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

"Without troubling you with what I have so many times written and explained to you verbally, on the importance of the acquisition of the *document*, I will only say now what it *must* be, and it is this:

"1. A full and complete ratification of all the acts of the Alcalde of this jurisdiction in the possession of the mine.

"2. A full and unconditional grant to Castillero of two sitios of land covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you at Tepic. Both of these documents to be of the proper date, and placed in the proper governmental custody in Mexico; and—

"3. The necessary certified copies of them duly authenticated by the American Minister in that capital, taken and sent to me at the earliest possible moment."

Prompt reply was made by Barron, Forbes & Co., to that communication, under date of the 2d of March, 1850, in which they say: "Mr. Barron and Don Andres Castillero, are about to proceed to the City of Mexico and will attend to what you have recommended. When that letter was written, the persons therein named were about to proceed to Mexico, but Alexander Forbes, nine days later, wrote a letter to the same correspondent, in which he stated that Mr. Barron and Castillero have gone off to Mexico, and I wrote them to-day *respecting the document you know of, which, if possible, will be procured.*" Wishing, doubtless, to keep his correspondent well advised of the efforts being made to comply with his requisition for the title papers to the mine, he wrote him again on the 7th of April, 1850, in which he stated "that Mr. Barron and Castillero have arrived in Mexico, and have every prospect of *finding the documents you are aware of* and which will, of course, be forwarded as soon as possible."

Counsel for claimant admit that every one of these letters are genuine, and the proofs in the case are full to that effect. Comments upon these extraordinary documents are unnecessary as

they disclose their own construction and afford a demonstration that those in the possession of the mine, holding it under conveyances for the claimant, knew full well that he had no title.

X. More than that can hardly be required in this case, but it is equally true, and satisfactory proofs are exhibited in the record to show it, that Mexico herself knew, *must have known*, that the pretensions of the claimant were unfounded, else she never could have agreed to the 10th article of the treaty, or, when that was stricken out, never could have given her sanction to the corresponding explanations that were signed by the duly authorized representatives of both countries. Remarks, however, upon that topic are unnecessary, and we forbear to pursue the subject.

The decree of the District Court in No. 133 is reversed, and in the other the appeal is dismissed, and the cause remanded with directions to dismiss the entire petition.

Mr. Justice CATRON, dissenting: I am of the opinion that Castillero acquired an incipient right by the discovery of the mine, and the surface of the land lying above the mine to the extent that it was adjudged to him by the District Court.

I also think Castillero made registry of his discovery before the proper tribunal according to the Mexican laws as they existed in the Territory of California at the time the registry was made and notified to the public. That the Alcalde had jurisdiction as a judicial magistrate in the absence and non-existence of any other authority in California to make the registry and give possession; and that this state of the law was virtually recognized by the Mining Junta at the city of Mexico, when Castillero applied to that tribunal for assistance in money, lands, and retorts, to assist him in working the mine. The request was promptly granted by the Junta, with two leagues of land to furnish fuel for evaporating the quicksilver; and this proposed grant, the President of Mexico sanctioned, referring the application for the grant of land to the Governor of the Territory, but which was never presented, and could not be, owing to the American war.

These officers of the Supreme Government were fully aware that no Mining Boards existed in California, nor any Courts of the First Instance; and that therefore the Court of the Alcalde was the tribunal exercising the powers of a Court of the First Instance. Such is the settled construction of the Alcalde's power in California. *Mena* vs. *Le Roy*, 1 Cal. R., 220. The rule in Mexico was, that in the absence of Mining Deputies, the ordinance Judges might act, and did in fact act, both in registering the discoverer's application and in giving him judicial possession of the mine. So various witnesses prove, and among them Mr. Larkin, our consul at Monterey, at the time of this discovery.

I think it true, beyond any reasonable ground for doubt, that in other parts of Mexico, Alcaldes did act on applications such as that of Castillero, where gold or silver was discovered, and that many mining titles are held by virtue of registries and acts of possession transacted before Alcaldes, and recorded in the form of espedientes in their Courts, just as the evidence of Castillero's was found in Alcalde Pico's office. Nor have I any doubt, whatever, that if the Mexican Government had continued in California, that the title to this mine would have been confirmed to Castillero, not only promptly, but without dispute, concerning *small* and immaterial irregularities. That Government, in my judgment, would have recognized the discoverer's equity, founded on the right of discovery. This discovery is free from doubt, nor is the *fact* of discovery disputed. So the Mexican officers from the President down, treated it when presented to them, and so the judges of the District Court held, when they confirmed the claim. Their judgment, and the reasons for it, we are called on to review; and it is due to them to say, that, in a long judicial life, I have never had presented to me, a case so laboriously and thoroughly investigated in the lower Courts. With them this case has been the study for years. The claim, perhaps, covers the most valuable mine in the world, and its title has been litigated at an expense and with a degree of labor and ability, rarely equalled, and never excelled within my experience.

I have examined the opinions of the judges who decided the

cause in the District Court and the briefs of counsel, and have verified the arguments by the record on all material questions, so far as I thought them material, and my opinion is, that the law and the facts discussed by the District Court, and on which its judgment is founded, furnish reasons that cannot be answered, showing that the claim is valid. And I adopt the opinion and reasons preceding the judgment below as my opinion in the case here.

Judge Hoffman's individual opinion displays an astuteness and a knowledge of the facts, and of the mining laws applying to the controversy, hardly to be excelled, and with which I fully concur, with the exception, that I think he was in error in maintaining that the President of Mexico granted the two leagues of land covering the mine. The President referred the request of Castillero for the land to the Governor of California, to be proceeded on by him, according to the Act of 1824, and Regulations of 1828. This was not done by the Governor, because the United States troops expelled him and broke up the Mexican authorities exercising the granting power, before he had time to act.

It was obviously a matter of great anxiety with the Supreme Government, that this quicksilver mine should be worked immediately, and as extensively as possible, because Europe had to be relied on for a supply of quicksilver, without which the gold and silver mines of Mexico were comparatively worthless. This discovery of Castillero was, therefore, esteemed by the Mining Junta and the higher officers as of the greatest importance. So important was it deemed, that our Government was officially notified by our Consul, Mr. Larkin, (acting nearest to the mine,) that the discovery had been made. The mine drew to its development a great amount of capital. Nearly a million of dollars has been expended in opening and bringing forth its resources The public have been benefitted many millions by the quicksilver furnished to those working the gold mines discovered in California, and on both sides of the Rocky Mountains. The public benefit, past and prospective, can hardly be over-estimated. So far from being the subject of reproach and severe criticism, the wealthy proprietors who have worked this mine

with success, are entitled to our approbation, as they have undoubtedly been public benefactors. Truly, their object was gain; but they have done that which poverty could not accomplish, and they have done that which the United States, as the successful litigant, will, in all human probability, fail to do; that of being successful miners.

Much stress has been laid on the fact, that James Alexander Forbes proposed to his associates to forge a title to this mining property: Forbes, apprehending that Castillero's claim was not valid, because the proceeding to acquire a legal interest was irregular. But no step was taken to fabricate an apparent title nothing was done towards its accomplishment. The proposition died in its conception, and as a controlling circumstance in the case the fact is worthless.

1. That Castillero discovered the mine, is true beyond controversy.

2. That he registered the fact of discovery in the Alcalde's office, and that it was made notorious, is, I think, true. It was officially communicated to the Mexican Congress by Secretary of Interior Relations; that it was prominently notorious in California; was officially communicated to our Government, and was published in the newspapers of the Sandwich Islands.

3. Nor is it open to any dispute, as it seems to me, that Castillero's right, as a discoverer, was recognized by the Supreme Government of Mexico, as a valid and highly meritorious claim.

4. The mine was never denounced by any one for irregularity in the proceeding to perfect the title to it, nor for abandoning the possession.

In this condition the claim stood when we acquired the country; and we are bound by the treaty to protect all just private interests in lands in the territory acquired by it. I, therefore, think the judgment of the District Court should be affirmed

Mr. Justice WAYNE, dissenting: I concur with Mr. Justice Catron and Mr. Justice Grier, for the reasons given by them, and for other reasons expressed in the printed opinions of Judge

McAllister and Judge Hoffman, in dissenting from the judgment of this Court just announced in this case.

I think that the claim and title of the petitioner, Andres Castillero, to the mine known by the name of New Almaden, in Santa Clara County, Northern District of the State of California, is a good and valid claim and title, and that the said Andres Castillero and his assigns are the owners thereof, and of all the ores and minerals of whatsoever description therein in fee simple. In my judgment, also, I concur with the learned Judges of the District Court, &c., &c., that the said mine is a piece of land embracing a superficial area, to be measured on a horizontal plane, equivalent to seven pertenencias, each pertenencia being a solid, of a rectangular base, two hundred Castilian varas long, of the width established by the Ordinanza de Mineria of 1783, and in depth extending from and including the surface down to the centre of the earth; said pertenencias to be located in such manner as the said Andres Castillero or his assigns may select, subject to the following conditions: First, that the said pertenencias shall be contiguous, that is to say, in one body; and secondly, that within them shall be included the original mouth of the mine, known as New Almaden.

Having thus fully expressed my concurrence in the decree rendered by the District Court in favor of Andres Castillero and his assigns, and my dissent from its reversal by this Court, I will add that, in my opinion, it is fully shown by the testimony and documents in the record that in no thing done by Castillero or his assigns, in connection with the mining claim, is there any proof of fraud; and I believe, from the testimony and from those documents, that the petitioner and his assigns have rights under the 8th Article of the Treaty with Mexico, of which they cannot be deprived by any judgment rendered by this Court or its proceedings upon the record brought into this Court by appeal.

I adopt and herewith annex to this dissent the opinion of his Honor, Ogden Hoffman, District Judge, (as embodied in the record,) as the best way of showing my appreciation of the law

and merits of this case, and of his judicial learning and research in connection with it:

The claimant in this case asks the confirmation of his title to—

First. A mine of quicksilver situated in Santa Clara County, and called the mine of "New Almaden," including three thousand varas of ground measured in all directions from the mouth of the mine.

Second. Two square leagues of land situated upon the land of the above mentioned mining possession.

It is objected that this Court has no jurisdiction to decree a confirmation of the former claim. The objections relied on by the United States are two:

1. That by the Act of 3d March, 1851, the jurisdiction of this Court is confined to cases where the interest claimed is a fee simple interest, or such as in equity should be converted into one, and that such interest was not held by the owner or grantee of a mine by Mexican law.

2. That the subject-matter of this claim is not "*land*," within the meaning of the Act.

The first objection is not only wholly unsupported by the words of the Act, but it is inconsistent with the sense of justice and the sacredness of treaty stipulations which we must presume to have actuated Congress.

1. The Act declares that every person claiming lands by virtue of *any* right or title derived from the Spanish or Mexican Governments shall present his claim, etc.

There is thus no specification as to the *nature* of the claim, except that it must be to "*land*," nor of the *estate* or *interest* claimed. It may be leasehold or freehold, conditional or indefeasible, for years or in fee.

2. That such estates constitute property, in its fullest sense, will not be denied.

If, then, claims to such estates in lands cannot be presented for confirmation under the Act of 1851, or if presented are to be rejected, this species of property in land is not merely unprotected, but by the terms of the Act it is confiscated; for the 13th

Section provides that all lands, the claims to which have been finally rejected, or which shall not have been presented within two years, shall be deemed, held and considered as part of the public domain of the United States.

It cannot, therefore, be imputed to Congress that it meant to declare all lands public property the claims to which were not presented, and at the same time restrict the right of presenting claims to a limited number of cases, thus ignoring and confiscating all rights of property in land but those of a particular description, when all were equally sacred under the laws of nations and the stipulations of the Treaty.

8. But even if the jurisdiction of this Court were limited, as supposed, the estate of the owner of a mine under the Mexican and Spanish Ordinances was of at least as high a decree as a determinable fee at common law, and the concession of a mine conveyed to him full property in the very substance of the mine.

As, however, the nature of the mine-owner's estate in a mine cannot be considered without examining and ascertaining what was the nature of a mine itself, and whether it constituted "land," as that term is used in the common law, and in the Act of Congress, the point will be treated of in considering the second objection to the jurisdiction of the Court.

2. Is a mine *land* within the meaning of the Act of Congress?

"By the civil law," says Gamboa, "all veins and mineral deposits of gold and silver ore, or of precious stones, belonged, if in public ground, to the Sovereign, and were part of his patrimony, but if on private ground, to the owner of the land, subject to the condition, that if worked by the owner he was bound to render a tenth part of the produce to the Prince as a right attaching to his Crown. It subsequently became an established custom in most kingdoms, that all veins of the precious metals, and the produce of such veins, should vest in the Crown and be held to be a part of the patrimony of the King or Sovereign Prince. That this is the case with respect to the Empire of Germany, the Electorates, France, Portugal, Arragon, and Catalonia, appears from the laws of those countries, and from the authority of various authors." 1 Heath. Gamboa, 15.

The reasons for attributing to the Sovereign this right of property in a part of the soil of the land of his subjects, it is not necessary to recapitulate; but that the distinction between the ownership of the surface, and that of the mines or minerals beneath it, was recognized at a very early period, appears from the law of the Partida, which declares that the property of the mines shall not pass in a grant of the land by the King, although not excepted out of the grant—and even if included in it, the grant shall be valid as to mines only during the life of the King who made it; and a similar rule prevailed in England with respect to mines of the royal metals, which alone were held to belong to the Sovereign by prerogative.

The distinction thus drawn between the right of property in the surface, and that in the minerals beneath, is founded on the essential difference in the qualities of the various substances of which the earth is composed. It has accordingly been recognized in the jurisprudence of all nations.

In Spain, as we have seen, mines do not pass in grants of land (fundos) by the Sovereign, unless particularly mentioned. (1 Heathf. Gamb. 132.) To the same effect is Solorzano, (Pol. Ind. lib. 6, ch. 1 No. 17,) who says: So that, although private persons may allege and prove that they possess such lands (tierras) and their appurtenances by special gift and concession of the Prince, no matter how general may be the words in which the grant is made, this will not of itself be of any avail or advantage to them for acquiring or gaining thereby the mines which may be discovered in the lands, unless it is so specially provided and expressed in said grant;" and Colmeira, (Der. Adm. Esp.) observes: "Jurisconsults and Publicists agree in the opinion that it is proper to distinguish in the soil (en el suelo) the right of property in the superficies (de la superficie) from that in the depth (del fondo.) Truly, the man who acquires a piece of land, gives not the least labor nor advances the smallest capital in consideration of the riches (las riquezas) which it may conceal. He examines its fertilty, its situation, its extent, and all the circumstances which determine its value as a building-lot or agricultural land, but he does not take into account the mines

which, perchance, it may conceal in its bowels. There is not, then, the least relation between the proprietor (of the land) and the subterranean matter from which any right can be deduced."

So, Lares, a Mexican author, in his Derecho Administrativo, p. 93, remarks: "The law then, has not recognized property in the mine to be in the owner of the soil, but has made the property in the mine to consist in the grant which the Nation makes to him who registers or denounces it conformably to the ordinance."

By the French law of 1810, the same distinction is recognized, and all mines of gold, silver, platinum, lead, mercury, etc., are declared not to belong to the owner of the soil, but to be governed by the Mining Laws (Teulet's Sup. to Codes, Verb. Mines.) "From the moment," (says the author last cited, "when a mine shall be conceded even to the proprietor of the surface, this property shall be distinguished from that of the surface, and thenceforth considered a new property," and, Le Guay, in his Thesis on Mining Legislation, says he "agrees with Mirabeau in the proposition that any legislation which does not recognize two species of property, one in the surface of the earth, and the other in its depth, would be absurd." P. 125.

In his work on the General Jurisprudence of Mines, M Blavier observes: "It is a truth which has been admitted for a long time, that the preservation and prosperity of mines depend essentially on the adoption of a system of laws calculated to reconcile the interests of the public with that of those who work them. * * * It is these conditions which the governments of ancient and modern States have sought to fulfill in admitting, nearly all of them, that the Sovereign alone has the right to dispose of the public property in mines, or to confer on others the useful enjoyment thereof."

This regalian right, or right reserved by the whole State to dispose of subterranean property as public property, independent of the private ownership of the land which conceals it, seems to have been recognized in Germany from the earliest periods; (Cancrin. Dr. Pub. des Mines en Allemagne, p. 2;) and M Blavier remarks: "It is, therefore, not surprising that this

regalian right should have been confirmed by nearly all the governments of the northern countries."

But it is unnecessary to multiply authorities in support of a principle so universally recognized.

From the foregoing citations it is clear—

1. That the grant or ownership of the superficies or land which contains the mine, confers no right of property to mines in the bowels of the earth, or even on its surface; and

2. That this property in the mines is, by common consent of almost all modern States, deemed to be vested in the State represented by the Sovereign, and is a regalian right. Indeed, it would seem, that these two propositions are sufficiently demonstrated by the fact that mining ordinances exist in almost every State possessed of considerable mineral wealth; for those ordinances are but the dispositions made by law for the exercise of this regalian right, or right of property in all mines, whether in public or private land.

Having thus established that the right of property in mines is wholly distinct from the ownership of the soil, and that the former remains in the Sovereign, notwithstanding the possession of the latter by a private person, we proceed to inquire:

1. Did this right to the mine constitute a right to "land," as that term is used in the Acts of Congress?

2. If so, did the miner by registry and denouncement acquire an estate in "land," and what was its quantity and quality?

These two inquiries, though in form separate, are nevertheless intimately connected; for the nature of the subject-matter of the right of property reserved by the Sovereign, can best be ascertained by inquiring what was the subject-matter of the estate conveyed to the subject by registry and denouncement, as also the quality and quantity of such estate. "For how," as remarked by Lares, "can the nation grant that which it has not, or how can it give to one person what belongs to another?"

It will be shown that minerals owned by a title wholly independent of the property in the lands in which they are situated, still form a part of the land itself, and constitute land in the strictly legal acceptation of that term at common law. Inde-

pendently of authority, it would seem clear that, it being admitted that "various sections of the soil divided horizontally," (1 Eng. Law and Eq. Rep. 249,) may belong as separate properties to different persons, the sections which are beneath the surface must constitute "land," as much as those which are upon it. The vein of ore or the bed of coal is "land," as fully and completely as the superficial earth, and he who owns the former owns *land* as much as he who owns the latter. On this point the English authorities are agreed.

Nor is the application of those authorities to the question under consideration at all affected by the circumstance that, in England, the regalian right to mines is held to extend only to mines of the precious metals; for the owner of lands in which mines of the base metals are situated, having alienated to one person the mine, but reserved to himself or alienated to another the lands in which the mine is found, the question whether the owner of the mine is an owner of "land," would be presented precisely as if the severance of the two rights of property had originally existed, and the several properties derived by separate grants from the Crown.

"When the mines form part of the general inheritance, they will, of course, be transferred along with the lands without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a title to them must be established, without reference to the general title of the lands in which they are situated." Bainbridge on Mines, p. 4; Rockwell, p. 586.

In the latter situation, "they still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made." —*Ibid.*

They are capable of livery and being made the subject of ejectment. Cro. Jac., p. 150.

"By the name of *minera*, or *fodini plumbi*, the land itself shall pass in a grant if livery be made, and also be recovered in an assize." Co. Litt., 6 a.

It is held that mines do not lie in grant, but pass like other

hereditaments by livery of seizin. *Chetham* vs. *Williamson*, (4 East, p. 476; 2 Barn. & Cress., p. 197.)

When a reservation in a deed of feoffment is made in favor of the grantor of mines, no livery is necessary, for the grantor will never have been out of possession; but when the exception is in favor of a stranger to the legal estate, livery cannot be dispensed with. Co. Litt., 47 a; 1 Ad. & Ell., p. 748.

In numerous English cases, the distinction is clearly drawn between a mere license to dig and carry away ores, in land of which the possession is retained by the grantor, and a demise of the mine itself, by which an estate in the land is created; nor is it necessary, to constitute such an estate, that the grantee acquire any right or interest in the surface—for minerals are capable of forming a distinct inheritance in the lands of which they are a part, and consequently, an actual estate may be both created in, and restricted to, any specified kind of minerals. 19 Vesey, p. 158; 4 East, p. 469; 2 Barn. & Ald., p. 724; Bainbridge on Mines, pp. 3, 55, 124, 141, 170.

In *Stoughton* vs. *Leigh*, (1 Taunt., p 408,) it was held, that a grant of a stratum of coal in the land of another is a grant in fee simple of a real hereditament, and that the widow of the grantee was dowable of all the mines of her husband, as well those which were in his own landed estates, as the mines and strata of lead, or lead ore and coal, in the lands of other persons.

In *Wilkinson* vs. *Proud et als.*, (11 Mees. & Wels., p. 33,) it was held, that a right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. But a bare right to dig and carry away coal in another man's land may.

An action of ejectment, an assize, a common recovery trespass, an action for use and occupation, and almost all the legal remedies applicable to "land," can be maintained at common law with respect to a *mine*. But they do not lie for an incorporeal thing. Ad. on Eject., p. 18-20; Co. Litt., 6 a.; Bainbridge on Mines, p. 141; 2 Barn. & Ald., p. 737; 4 Barn. & Ald., p. 401; 2 Strange, p. 1142.

The case of *The Queen* vs. *The Earl of Northumberland*, (Plow

den, p. 310,) is relied on by the counsel of the United States to show that in England the right of the King to royal metals in the lands of a subject is a merely incorporeal right or easement, like rights of common, way, estovers, and the like.

But it is not so said in the case. It is merely said, that as the subject may acquire by usage, title or interest in the freehold or inheritance of the King, as common, way, estovers, etc., so the King may possess by prerogative a title or interest in the freehold of the subject. It is not said that the title or interest of the King in royal mines is identical with the title or interest of the subject, who has a right of common, way, estovers, etc., in the King's lands.

If the private owner of the inheritance can, by his grant, sever the right of property in the soil from that in the mine, and vest the ownership of the former in one person, and of the latter in another; and if the mine so owned is "land," it is not easy to perceive why, when the severance is effected by law, and the King is the owner of the mine, he should not also be deemed the owner of "land;" and this, whether the royal right is confined, as in England, to a particular description of mines, or extends, as in Spain, to all mines.

That this was not meant to be decided in the case in Plowden, is clear; for no question was made as to whether the right of the King was a corporeal or incorporeal hereditament, and the judgment of the Court was, "that all ores of gold and silver in the lands of subjects, whether the mines thereof be opened or unopened, with power to dig in the lands of the subjects for the same, and to carry them away, with all other incidents thereto, *belong of right to the Queen.*"

From the forgoing authorities, it is abundantly clear, that the law of England is not guilty of what Mirabeau calls the absurdity of refusing to recognize two species of property, one in the surface of the earth, and the other in its depth.

That in the case of royal mines, the property in the mines remains in the Crown, distinct from the general ownership of the land in which they are situate, and in the case of base mines, the general owner may sever by his own grant the property in the

mines from the property in the lands. But in both cases, the mine or strata of minerals form part of the land itself, and are *land* in as strictly legal a sense as the non-metalliferous portions of the soil.

Having thus seen that a property in veins of metals is a property in "*land*," notwithstanding it is entirely independent of the property in the soil which contains them, and that it is so regarded, whether the severance between the two species of property be effected by the grant of the Sovereign to whom royal metals belong, or by the owner of the inheritance, who, by the law of England, was the owner of the base metals within his lands, we will next inquire what was the nature of the estate which was acquired by registry and denouncement under the Spanish and Mexican laws.

This inquiry will necessarily involve a consideration of the nature of a mine under those laws; for it is admitted, as urged by the counsel of the United States, that an estate in a mine may closely resemble an estate in land, while the subject-matter of the two estates may remain essentially different.

It will, therefore, be shown not only that the estate of a mine-owner is nearly identical with a fee simple conditional estate in land, at the common law, but that the subject-matter of that estate, viz., "a mine," as defined in the Ordinances, is "*land*" in the strictest sense, as proved by its intrinsic nature, and by the application to it in Spanish and Mexican laws and treatises of terms which describe and express what is understood in our jurisprudence by the word "*land.*"

In the earlier periods of the Spanish Monarchy, it was established as a principle of Castilian law, that all mines found in the Royal Seignory belonged to the Crown. All persons were prohibited from working them except under royal license. Part. 3, tit. 28, law 11; Nov. Recop. lib. 9, tit. 18, law 1.

In 1387, permission was given to every person to work mines found within his own inheritance, or in that of other persons with their permission. Nov. Recop. lib. 9., tit. 18, law 2.

And as early as 1526 and 1551, a general royal license was given to work mines discovered in the Indies, on giving an account thereof to the Governor, and payment of a certain pro-

portion of the product to the Crown. Recop. de las Ind. lib. 4, tit 19, 61 14.

On the 10th January, 1559, Philip II., by a law promulgated on that day, extended to all mines of gold, silver and quicksilver found within the kingdom, whether on royal land or on those of lordships, or of the clergy, or in public, municipal, vacant or private lands, the right of ownership which had previously been vested in the Crown, as to mines found within the Royal Seignory; and all mines of the three metals named were declared "to be resumed and incorporated in the Crown and royal patrimony of the King," excepting only such mines of gold or silver, as had, under previous grants to individuals, been begun to be worked, and were then actually worked Nov. Recop. lib. 9 tit. 18, l. 3, Halleck's Mining Laws, pp. 6, 15; Rockwell. 113, 116.

The reasons for this act of high sovereignty are set forth in the preamble of the law. They are chiefly founded on the policy of stimulating the discovery and working of mines, by giving to all subjects of the Crown the right of discovering and acquiring the ownership of them in limited parcels, in order that thereby this source of national wealth might be developed, instead of being locked up, as theretofore, in the hands of a few, who did not or would not develop it. Rockwell's Gamb. Comm., p. 127; Nov. Recop. lib. 9, tit. 18, l. 3; Halleck's Transc. p. 6–11.

It thus became an established and fundamental principle of the Spanish law, that all mines of gold, silver, quicksilver, and other metals, whether found on public or private lands, belonged to the Sovereign. Rockw. Gamb., 126, 127; Solorzano Polit. Ind., lib. 6, cap. 1, No. 17; Ordenanzas de Mineria, p. 68; Ordinances of 1783, lib. 5, art. 1; Ordinances of 1584, lib. 6, tit. 13, l. 9.

To carry into effect the policy thus inaugurated, ordinances were established in 1584, (called by Gamboa the Old Ordinances,) which continued in force until August 22d, 1783, when the New Ordinances, as they were called by Gamboa, were enacted.

By these new ordinances, all former edicts and ordinances were revoked so far as they were opposed to the provisions of the new law except the provisions of the law of 1783, so far as they

treated of the incorporation into the royal patrimony of the gold, silver, and quicksilver mines of the kingdom.

The 2d article of the New Ordinances is as follows:

"And in order to benefit and favor our subjects and natives, and all other persons whatsoever, even though foreigners to these our kingdoms, who may work or discover any mines of silver already discovered, or to be discovered, we will and command that they shall have them, and that they shall be their property in possession and ownership, and that they may do with them as with any thing their own, observing, as well in regard to what they have to pay by way of duty to us, as in all else, what is prescribed and ordered in this edict." Halleck's Transc., p. 70.

By the laws of the Indies, the Emperor Charles and King Philip II. had made a similar grant to all their subjects, whether Spaniards or Indians, (except certain officers,) authorizing them to work the mines freely and without impediment, and "making them common to all persons, wheresoever situate;" provided, that the Indians should not be injuriously treated, and that no other parties be prejudiced. 1 Heathf. Gamboa, p. 20, book IV. lib. XIX., law 1; Recop. de las Indies; Halleck's Transc., pp 130, 140.

From the very ample terms of these grants a doubt arose, says Gamboa, whether the mines were still to be regarded as the peculiar right of the Crown, or whether they were to be considered as the absolute property of the subject.

On the one side, Don Mateo de Lagunez and Cardinal de Luca were of opinion, that as all mines in the Indies had been declared "*common*," and all persons were at liberty to try for them, wherever situate, it was to be inferred that the mines were no longer vested in the Crown, and that the effect of the Ordinances was precisely the same as if the mines had been made private property, (*particulares,*) as they may be by concession and privilege.

This opinion Gamboa combats, and after discussing the question at length, concludes that the mines remained a right of the Crown and annexed to the royal patrimony, and that the laws made the vassals "*participants*" of this right; not giving them

the private and absolute property to use at will, but in subjection to the Ordinances; and that although the laws concede to them the ownership and property (dominio y propiedad,) it is by "participation," and not by absolute translation, (por participacion y no por translacion absoluta;) the supreme right of property (alto dominio) remaining in His Majesty.

"The correct opinion then seems to be," says Gamboa, "that the mines remain attached to the Crown (que S. M. mantiene en su corona las minas,) and that the King, not being able to work them himself, has admitted his subjects to a share of them (dio parte á los vasalos) under various restrictions and subject to various liabilities."

The opinion advocated by Gamboa appears to have been adopted in the Ordinances of 1783, in which many of the suggestions of Gamboa were embodied. (Gamboa, chap. 11.)

The first two articles of title V. of that Ordinance are as follows:

"*Art.* 1. Mines are the property of my Royal Crown, as well by their nature and origin, as by their re-union, declared in law IV., lib. XIII, book VI., of the Nueva Recopilacion.

"*Art.* 2. Without separating them from my royal patrimony, I grant them to my subjects in property (*en propiedad*) and possession in such manner that they may sell them, exchange them, rent them, donate them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the mines belongs to them, on the same terms on which they themselves possess it, and to persons capable of acquiring it." Halleck's Transc., p. 222.

It was under these last Ordinances that the rights of Castillero were acquired; but as they adopted the views of Gamboa as to the Ordinances of 1584, his Commentaries on the latter, and definition of the mine-owner's estate acquired under them, are of controlling authority in the interpretation of the Ordinances of 1783.

In Section 24, p. 19, Gamb. Comm. Heathf. Transc. pp. 27–8, he observes; "Having established then the regalian right of His Majesty in the mines, and that this right is entirely consistent

with the right of disposition and property (con el dominio y propiedad) of the subjects, it is indisputable, that as a consequence of their passing to the latter with power to dispose of them, as their own (como cosa suya) all the incidents of "*property*" (propiedad y dominio) must attach in favor of the proprietor, and that they may therefore be exchanged, sold, leased or alienated by contract, donation and inheritance, may be given as a portion in marriage, or may be charged with a rent, and that interest may be demanded for the purchase-money while remaining unpaid, etc., etc.

"There passes, then, to the subject the direct dominion or property, as also the right to the use (dominio directo ó propiedad, y tambien el util,) by virtue of the favor and grant of the Sovereign—which we hestitate not to call a gift on conditions (una modal donacion,) as will appear upon considering the rules by which that species of grant is defined in law: that is to say, that it be a free and complete act, which being perfected, a charge attaches on the donee from that time forth, (and the being worded as a condition makes no difference,) and that upon the failure of the modification limited by the donor in his own favor or in that of a third person, or of the Kingdom or Republic, the gift determines, as will be seen by reference to the various text and doctors." Ch. 11, sec. 25.

Throughout the Commentaries of Gamboa, the estate of the mine-owner in the mine is called the "dominio y propiedad;" and in sec. 15, ch. XXI, he says: "Another privilege treated of by the authorities above alluded to, is that of appropriating nine parts of the metal, paying only the tenth to the King as an acknowledgement of his having shared with his subjects the direct and superficial ownership (de aver participado á sus vasallos el *dominio util y directo*,) of so valuable a kind of property (*de tan preciosos fundos*).

We have already seen that the "alto dominio" of eminent domain is reserved by the King, by virtue of which and of the conditions on which the grant is made, a new grant may be made if the first be forfeited by breach of the conditions, viz.: the payment of the fifth, and the observance of the Ordinances

which Gamboa calls the modo, or gravamen with which the donation is charged, and which make it a "donacion modal."—Chap. 11, art. 26.

From the foregoing citations the nature of the estate in the mine acquired by registry and denouncement under the Spanish laws, might seem sufficiently clear.

It will, however, not be inappropriate to show what in Spanish law is the meaning of various terms which are used in the Ordinances, and by Gamboa, as descriptive of his estate. Those terms are "propiedad," "propiedad y posesion," "propiedad y usufructo," "propiedad y utilidad," "plena propiedad," "dominio," "pleno dominio," "dominio absoluto y perpetuo," "dominio directo y util."

"Propiedad," is the right to enjoy and dispose freely of things which are ours, so far as the laws forbid not. Commonly, the dominion which is not accompanied by the usufruct is called "propiedad," or "nuda propiedad," and the dominion which is accompanied by the usufruct is called "plena propiedad." Escriches Dict., verb. "Propiedad."

"Dominio," is the right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent.

It is divided into the full, and the less than full—"dominio pleno y menos pleno."

"Dominio pleno y absoluto," is the power which one has over anything to alienate independently of another—to receive its fruits—to exclude all others from its use.

"Dominio directo," is the right a person has to control the disposition of a thing, the use (utilidad) of which he has ceded.

"Dominio util," is the right to receive all the fruits of a thing subject to some contribution or tribute, which is paid to him who reserves in it the "dominium directum."—Escriche's Dict. verb. 'Dominio;" Alvares' Institutes, vol. ii., pp. 23, 33.

It appears, therefore, that the words which the laws and commentators apply to the miner's estate, viz.: "propiedad y usufructo" "plena propiedad," "pleno dominio," "dominio directo y util" etc., are descriptive in the Spanish law of the highest

estate or right of property in land which the subject can acquire.

It would seem to be higher than any right of property in land enjoyed in England; for, says Blackstone, "A subject has only usufruct and not the absolute property of the soil;" or, as Sir Edward Coke expresses, "he hath the '*dominium utile*,' but not the '*dominium directum*.'" Comm. bk. 2, ch. 7.

The ownership of the subject in the mine remains, however subordinate to the dominium altum, or eminens, or dominio alto of the Crown.

But this is merely the right tacitly reserved by the Government or sovereign authority of a State, and to which all individual rights of property are subject, to take possession of the property in the manner directed by the constitution and laws of the State, whenever the public interest may require. Per Ch. Walworth; *Beekman* vs. *Saratoga R. R. Co.*, (3 Paige R., p. 45.)

The fact that the estate of the mine owner may be forfeited or determined by a failure to comply with those of the ordinances which impose that penalty, *i. e.*, by breach of the conditions subsequent attached to the gift, in nowise affects its nature as an estate in fee.

Every estate held by feudal tenure was subject to forfeiture for breach of the conditions on which it was granted. Nor were these conditions always expressed in the grant; for every act of the vassal which amounted to a breach of his allegiance, or the tie which bound him to his lord, operated a forfeiture of the land.

In a grant of a mine the principal conditions, the breach of which worked a forfeiture, were: 1st, the payment to the Crown of its proportion of the products; and 2d, the working it according to the laws.

If no breach of these conditions occurred, the estate of the miner would continue forever.

It therefore closely resembled a conditional or determinable fee at common law. 1 Prest. on Est., 480. The number of cases where, by the Ordinances of 1584, the mine was declared forfeited, 'perdida,) was no less than fifteen, but many of these causes of

forfeiture were totally abolished, and the rigor of the laws was essentially mitigated by the Ordinances of 1783, and subsequent laws.

The decree of the Cortes of Spain, of January 26, 1811, exempted the miners of quicksilver from the payment "of all *duties*, even including *the duty* of the fifth, or the proportion *which* the miner is bound to pay;" and annulled "all dispositions which opposed free trade *in said* mineral, and the security of *absolute and perpetual* ownership (dominio absoluto y perpetuo) of the miner; provided, that in managing and working them, he observe the general rules established on the subject."

In the communication from the Secretary of the Regency, transmitting to the Royal Tribunal-General of New Spain this decree, he says:

"Under this date I notify your Excellency, that the prerogative of Seignory, which from remote times the Vice-Royal Treasury has reserved to itself with respect to mines of quicksilver, has been annulled by the General and Extraordinary Cortes, in consequence of the resolution and manifestation of the Council of Regency, enacting at the same time that the said mines shall be worked under the same rules and ordinances as those of gold, silver, and other metals, and that their possessors shall preserve their ownership and usufruct (propiedad y usufructo,) and in no case shall they be obliged to alienate them to the State—giving them permission moreover to sell their products to any one who will pay the highest price for them. This measure affirms in a manner *inviolable* the ownership (propiedad) and profits (utilidad) of this kind of real estate (de talis juicas), and dispels the reasonable fears which prevented individuals from taking them under their care."

It would not be easy to find words to express more strongly the notion of a permanent and inviolate right of property, than the language of this decree and communication. Orden. de Min., pp. 79–82; Halleck's Mining Laws, pp. 381–385.

One of the principal causes of forfeiture established by the Ordinances of 1584, was the failure to work the mine for four consecutive months. But even this provision, so necessary to

secure the great object of the Crown in conceding the mine, viz., the development of the mineral resources of the country, was regarded as highly penal, and therefore to be strictly construed. It was thus easily evaded, for by working the mine for a few days every four months the forfeiture was avoided. This defect was remedied in the Ordinance of 1783, which declared that the omission to work for eight months, whether successive or interrupted, in any one year, should forfeit the mine; but the Judge, before whom the mine was denounced, was authorized to admit, in addition to the excuses allowed by the former law, any "other just causes which, combined with their former merit, might render the miners worthy of equitable consideration." Halleck Transc. 244; Ord. of 1783, Art. 15; Heathf. Gamboa, p. 80–86.

Some of the other causes of forfeiture were for the breach of directions in the Ordinances clearly necessary for the security of the mine or of the operatives—such as removing the pillars or supports of the mine, or in other ways neglecting to comply with the rules of the Ordinances, or the directions of the competent authorities, as to their security and preservation, and their better working. Ord. of 1783, Arts. 7, 10, 11, 12, 13, 14, 15; Halleck's Transc. 342, *et seq.*

In some cases these forfeitures were only imposed after repeated offences, (Art. 10,) and all the facts were to be judicially ascertained in appropriate proceedings.

From the foregoing it results, that although "the observance of the Ordinances," was in strictness a condition of the concession, yet in fact the forfeiture of the mine was a punishment or penalty imposed for violations of salutary and necessary rules, incurred in but a limited number of cases, and when no equitable considerations existed for mitigating their rigor.

A determinable fee, however, determined by the act or event expressed in its limitation, usually beyond the control of the tenant, and the occurrence of which could not be imputed to him as a fault, still less as a violation of law.

The annexing of conditions subsequent to grants, seems to have been a policy by no means peculiar to Spanish jurisprudence with regard to mines. It was intended to provide a

security for the attainment of those objects which formed the consideration for the grant.

These, in colonization grants, were generally occupation and cultivation. In Florida and Louisiana, the settlements were made under a preliminary concession or warrants of survey, and on the fulfillment of the conditions, the final or perfect title was issued.

In Mexico, however, under the Law of 1824, and the Regulations of 1828, a perfect title issued in the first instance, but charged with conditions as to occupation and settlement; and the grant provided that "if the grantee failed to comply with the conditions, he should lose his right to the land, and it might be denounced by another."

I am unable to perceive any substantial difference between the estate of the colonization grantee and that of the mine-owner. Both liable to denouncement and forfeiture for non-compliance with the conditions expressed in or annexed by law to the grant; and in both cases, equitable excuses could, in general, be received for the omission.

In the California land cases, the existence in the grants of conditions subsequent has never been regarded as presenting any obstacle to their confirmation—where no forfeiture had accrued and been judicially ascertained under the former Government.

Having thus ascertained the nature of the mine-owner's estate in the mine, we are next to consider what was the nature of a mine itself, considered as a subject of property.

From the quality of the estate, and the fact that it possessed all the incidents of an estate in *land*—that it was alienable devisable, and inheritable—that it could be leased, charged with a rent, mortgaged, and given as a portion in marriage, etc., it might reasonably be concluded that the Spanish law, like the English, regarded the mine as "*land.*" But all doubt is removed by recurring to the terms which were applied to it. It is a "fundo," or land. 1 Gamb., ch. v., sec 5; id. ch. xxi., sec. 15. "bienes raices," or real estate. Id. ch. xvii., sec. 22. It is "bienes immobles," or immovables. Id. ch. xxiii., sec. 6. All the rules relating to pititory and possessory actions for lands are

applied to it, ch. xxiii., secs. 1, 6, 19; and in these cases the proceedings may be for the ore, or merely to substantiate the right of property in the mine, (sobre los metales ó puramente sobre la propiedad.) Ch. xxiii., secs. 20, 21.

The fact that a judicial delivery of possession was authorized to be made, indicates that the thing to which the title or right of property had attached was a corporeal hereditament. It is laid down by Alvarez (Inst. v. 11, p. 28, *et seq.*) as an axiom of the civil law, that "only things corporeal can be delivered, since only these can be transferred by corporeal act from one to another." And this corresponds with the rule of the common law, that corporeal hereditaments pass by livery of seizin, while incorporeal hereditaments lie only in grant.

As the Ordinances gave to the miner the right of property in and possession of the mine, the judicial delivery of the mine, after the title *to* the thing had been acquired by denouncement and registry, vested the mine-owner with the right *in* the thing, and gave him the *full* dominion—the title to and the right in the thing, the right to dispose of it, and the right to use—*dominio directo y util.* It is unnecessary to pursue this discussion further.

No one, I think, who examines the Ordinances and the Commentaries of Gamboa with care, can avoid the conclusion that the mine-owner, by denouncement and registry, and the delivery of the possession to him, obtained, under the Mexican law, a right to and property in the mine, and that the mine so acquired consisted of the very substance of the minerals of which it was composed—was a corporeal hereditament like a mine or stratum of ores in the English law, and was land in the strictest and fullest sense of the term.

The case of *Fremont* vs. *The United States,* (17 How. 565,) is relied on by the counsel of the United States as sustaining his objection to the jurisdiction. In that case the Court say: "In relation to that part of the argument which disputes the right on the ground that the grant embraced mines of gold and silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. *The only question before*

the Court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of sovereignty in them, are questions which must be discussed in another form of proceeding, and are not subjected to the jurisdiction of the Commissioners or the Court, by the Act of 1851."

It will be seen that the only question before the Court was whether the fact that mines of gold and silver had been discovered on land which had been previously granted under the colonization laws, destroyed the title of the individual to the land granted. It was of course held that it did not. Whether there were any outstanding rights of sovereignty in such mines, and, if so, what was their nature, and in what sovereign they were vested, the Court declared itself without jurisdiction to determine.

But it was not decided, nor could it have been intended to be decided, that a private grantee of a mine under Mexican law could not present his claim for confirmation under the Act of 1851. That question was not before the Court. And even if the language is to be construed as extending to a right to a mine acquired under Mexican law by a private individual, and is not to be restricted, as its terms imply, to rights of sovereignty outstanding in the United States or the State of California, it must be regarded as *obitar dictum*—not necessary to the determination of the case, and relating to a question which did not and could not have been presented by it.

A similar decision of the point presented for determination had already been made by the Supreme Court in *Delassus* vs. *The United States*, (9 Pet. 117.) The claim in that case was, like that of Fremont, for the confirmation of a concession of a tract of land. It differed from the case of Fremont in the circumstance that the motive of the petitioner in soliciting the grant was declared to be to make explorations for lead mines.

But the Court held that the concession was for land; and as all claims for lands were submitted to its jurisdiction, without any reservation in the Act of Congress of claims for lands containing lead mines, a confirmation could not be withheld.

In Fremont's case the same objection—viz.: that the land

granted contained mines—was taken, and the Court held, that that circumstance did not impair the validity of the grant, or divest its jurisdiction over it as of a claim to land. Such, it seems clear to me, was the whole scope and effect of the decision.

The nature of a *claim* to a mine, as distinguished from the right of an agricultural grantee to the surface, and the jurisdiction over such a claim confided to the Commissioners by the Act of 1851, were not considered, or intended to be decided.

My conclusions, then, on the question of jurisdiction, are—

1. That the jurisdiction of this Court is not restricted to those cases where the estate claimed in lands in California is a fee—or such as in equity should be converted into a fee.

2. That even if it were, the estate of a mine-owner in a mine is, under Mexican and Spanish law, a fee with conditions subsequent; closely resembling that of a grantee under the colonization laws.

3. That by the common law of England the ownership of the surface may be vested in one person, and that of the mine, or substratum of mineral in another; and that the latter is "land" in its strictest sense.

4. That by the Spanish and Mexican laws, a mine, considered as a subject of property, and distinct from the ownership of the surface, is "land," or rather, that terms are applied to it in those laws which are the precise equivalents of the common law term "*land.*"

And that therefore this Court has jurisdiction to ascertain and settle a private land claim to a mine, the title to which is derived from the Spanish or Mexican Governments, as of a claim to "*land.*"

Having thus ascertained that a mine is "*land,*" and that the estate of the mine-owner closely resembled a conditional fee at common law, we will next briefly inquire by what proceedings and in what manner that estate was acquired.

Such an inquiry naturally precedes an examination into the genuineness of the alleged title to the mine, and the determination of its legal effect if found to be genuine.

In art. 4, tit. VI., of the Ordinances of 1783, entitled "Of the

modes of acquiring mines—of new discoveries, registries of veins, and denouncement of mines abandoned or forfeited," is as follows:

"Those mentioned in the preceding articles must appear with a written statement before the Deputation of Mining of that Territory, or the one nearest, if there should be none there, stating in it their name and those of their partners, if they have any; the place of their birth, their residence, profession and employment; and the most particular and distinguishing features of the place (*sitio*), hill (*cerro*), or vein, of which they ask the adjudication. All of which circumstances, and the hour at which the discoverer presents himself, shall be noted in a book of registry, which the Deputation and Notary (*Escribano*) of Mines, if there be one, shall keep, and this being done, his written statement shall be returned to the discoverer for his due security, and notices shall be fixed to the doors of the church, Government houses, and other public places of the town, for due information. And I order that within ninety days he shall have made in the vein or veins of the registry, a pit (*poso*) of a vara and a half wide, or in diameter, and ten varas down, or in depth; and that as soon as this is done, one of the Deputies shall personally go, accompanied by the Notary, if there be one —and if there be none, by two assisting witnesses and a profes sional mining expert of that Territory—to inspect the course and direction of the vein, its width, its inclination to the hori zon, which is called *echado* or *recuesto*, its hardness or softness, the greater or less firmness of its sides, and the species or principal indications of the mineral—taking an exact account of all this, in order that it may be added to the corresponding part of its registry, with the evidence (*fé*) of possession, which shall immediately be given in my Royal name, measuring to him his *pertenencias*, and causing him to fix stakes (*estacas*) in his boundaries, as will hereafter be mentioned; which being done, there will be delivered to him an attested copy of the proceedings as a corresponding title.

"*Art.* 5. If during the ninety days any one shall appear pretending to have a right to said discovery, he shall have a brief

hearing in Court, and it shall be adjudicated to the one who best proves his claim; but, if he appear after that time, he shall not be heard.

Art. 7 provides, that when a question shall arise as to who is the first discoverer, he shall be held such who shall have first found metal in the vein—and in case of doubt, he who shall first have registered it.

It is well said by one of the counsel for the claimants, that the object of the various Mining Ordinances of Spain was to stimulate and promote to the utmost extent the discovery of mines and the development of their riches.

The means adopted to stimulate *discovery* were to give to the discoverer the mine he might discover—the State reserving for itself a small part of its products. The means by which the development of the riches of the mine was secured, consisted in making the continuance of the right of property dependent on working it to the extent and in the manner prescribed by law.

Discovery, therefore, was recognized by those laws as the real foundation of the right, and the true consideration for the grant of property in a mine.

Gamboa considered the discoverers of mines as entitled even to greater encouragement than the inventors of useful arts. Heathf. Gamb. 1, p. 259. And in all the Mining Ordinances of Europe, the right of the discoverer is recognized by the promise of a grant of the mine as a reward for the discovery.

In the *Sala Mejicana*, vol. 2, p. 58, discovery is declared to be one of the modes of acquiring mines, and it is recognized as a species of occupation, and as constituting a source of title, like the finding of a buried treasure, precious stones, and the like.

In the jurisprudence of Spain and the Continental Nations, discovery, with regard to mines, as a source of title and consideration for the grant, corresponds with occupation and cultivation under our own pre-emption laws with regard to vacant public lands; and in all the claims to lands in Florida and Louisiana submitted to the Supreme Court, the fact of settlement, under a contract for or with a just right to expect a title

has been regarded as a valuable consideration secured by the State, and creating an equitable obligation to confer the title.

But this inchoate right created by discovery must be perfected in the manner prescribed by law.

It is therefore required that the mine be registered; and without registry, says Gamboa, no mine could be lawfully worked, and it remains liable to be registered by any other person—the form of the ordinance not having been complied with. Chap. v., sec. 2. The reasonableness of this regulation, he remarks, is evident. It is not necessary to recapitulate the various arguments by which he vindicates its policy and necessity.

As the revenue was interested in a portion of the product of the mine; as the public policy required that an account should be taken of so important a part of the national wealth; as the mine-owner, from the moment of registry, became subject to laws designed to secure the development of the mine he had discovered; for these and other reasons, it was indispensable to provide a mode in which the discovery should be formally made known to competent authority and the right of the discoverer judicially declared and defined. Registry is, therefore, said by Gamboa to be the fundamental title, or the base of the title (el titulo fundamental de las minas), and the attributive cause of the subject's right of property in it; for the Crown has conceded the mines and made them common, subject to this burden or condition (gravamen). Ch. v., sec. 2.

And in other places he speaks of registry as "el titulo fundamental de el dominio de las minas." Ch. xi., sec. 2; ch. vii., sec. 3.

The registry, however, did not constitute the *title* to the mine in the sense of being itself a concession or grant.

The registry, or formal declaration of the discovery in the manner prescribed by law, was the fulfillment of the condition imposed in the general grant by the Sovereign on the discoverer of mines, and on its performance the law itself annexed the title as the legal consequence of discovery and registry. It still remained subject to further conditions—some to be performed

before a formal delivery of possession could be given, and some to be perpetually observed under penalty of forfeiture.

The registry was therefore required to be made before a judicial tribunal, and not before an administrative officer, who, like the Governors of California, might exercise a discretion as to whether or not the concession should be made. The declaration of the ownership of the discoverer was termed an "adjudication," and even after registry, and at any time during the period allowed the person registering for digging the pit, any person pretending to have a right to the discovery, was entitled to a hearing "*in Court,*" and the mine was *adjudicated* to him who best proved his claim.

In sec. 14 of chap. v., Gamboa states that "registries of mines in the Indies are not to be made before royal officers, but before the Justices of the Department alone; and the oath of the discoverer, that he will bring in to be stamped all the gold and silver, etc., is to insure the due levying of duties, and is not to be made upon the registry of a mine, *the title to which comes under the cognizance of the Justice.*"

In section 15, he says: "But *judicial matters*, such as registry, denouncement, the giving possession, etc., are the province of the justices, and, by way of appeal, of the royal audiences."

In sec. 24, he defines registry to be "any judicial order, or proceedings (autos ó diligencia,) which authenticate and afford evidence of some judicial act."

The whole proceeding thus seems to have been the judicial recognition and declaration of a previously existing right, asserted and established in the manner required by law, rather than the creation and conferring of a title which had no previous existence.

Thus, Gamboa, in speaking of the necessity of registering says: "And therefore, the discoverer, *if he would preserve his right*, should give notice of his discovery, and make himself known." Ch. v., 4.

So, in sec 17 of the same chapter—"If, after the expiration of the term of twenty days, some other person should come forward and register, the discoverer loses *his right*, this being

the penalty he is liable to pay for his culpable default, in neglecting to register *his mine*, and thus frustating the ends of the ordinances; for a mine which is worked without being registered, is not properly to be called a mine, and does not merit the name, even though it should yield good ore.

"The ordinances give the name of mines to such only as are registered, because the registry is the fundamental title (el titulo fundamental) to every mine; and because the omitting to make registry evinces a vicious intention to dispose of the ore of silver clandestinely, in fraud of the right of the Crown, and to put impediments in the way of other individuals who might wish to take mines upon the same vein, or at the same spot."—1 Heathf. Gamb. p. 150.

In neither the Ordinances of 1584, nor in those of 1783, is mention made of any title-paper to be delivered to the party, containing, in terms, any grant or concession of the mine.

His "statement" is, by the Ordinances of 1783, to be returned to him, after its contents have been duly noted in the register, "for his security," and when he shall have dug his pit he is to be put in possession, if no adverse claim be interposed. But the only evidence of his title consists in the judicial ascertainment and record of the fact that he declared his discovery in the form required by law, which being done, the law itself gave the title on the conditions fixed by the ordinances. When the pit had been dug, and judicial possession given, the 4th Article of the Ordinances of 1783, directed, as we have seen, that an authorized copy of all the proceedings (de las diligencias) should be given him as his corresponding title (como titulo correspon diente). To perfect and secure the right to a mine, registry was, in all cases, indispensable. In making it, all that was necessary was "to manifest the person, the place, and the ore." But if the mine had previously been worked, and was denounced for abandonment or other cause of forfeiture, a preliminary proceeding called a denouncement was required. This was in the nature of an accusation against the former owner, charging him with having left the mine unworked, or having come within some other ground of forfeiture. Upon this question a summary

judgment was had, after notice to neighbors, proclamation, etc. If the mine was declared forfeited, the denouncer was, nevertheless, obliged to register it and go through the same proceedings as the discoverer had done. Heathf. Gamboa, ch. v., sects. 21--22, p. 158.

That the discoverer of a mine was recognized by the law as having acquired a right to it, even before registry, is further shown by the terms of the 20th Ordinance of 1584, which enacts that "No person shall presume to register, or to enter in the register a mine which is not *his own property*, under the penalty of one thousand ducats," etc.

Among the cases mentioned by Gamboa, to which this law applies, is that of a person other than the discoverer of the ore registering a mine before the expiration of the twenty days allowed by the ordinance to a discoverer for registering his mine. 1 Heathf. Gamboa, pp. 156, 158.

The discoverer is thus treated as the true owner of the mine, until, by failing to register within the time prescribed, his rights are lost; and the registry of the mine within that time by any person in his own name is considered and punished as a fraudulent attempt to acquire the property of another, like a similar act by the mortgagee of the mine, or by the curator or tutor of a minor, and other cases mentioned by Gamboa.

From these and many other provisions in the ordinances and passages in the Commentaries of Gamboa, the nature and effect of registry is unmistakably manifested; nor can our views of it depend upon the meaning we attach to a single phrase of Gamboa (el titulo fundamental), as to the correct translation of which a question was raised at the bar.

The foundation of the right to a mine was discovery. But this right was lost unless the discoverer made known the fact before the judicial tribunal authorized to receive such declarations. The proceeding for the purpose was entirely *ex-parte*, and consisted merely of a production of the ore, a description of the place where it was discovered, and the person of the discoverer. These facts being duly made known and recorded, the title passed by operation of law, unless within the time limited

some one having a better right appeared. The foundation of the denouncer's right was in principle the same.

Having brought to the notice of the Court, and established that a mine was abandoned or had been forfeited, the law gave him the right to register it in his own name, like a new mine, except that not being an original discoverer, the mining space (pertenencias) to be assigned to him was more limited.

The registry cannot be regarded as the base of the title to the mine, in the sense, that without registry a right of property could, in no case, be asserted to it; for as we have seen, even after registry by an alleged discoverer, and after he had dug his pit, obtained judicial possession, and even had his pertenencias measured, any one pretending to have a right to the discovery, could within ninety days from the date of the registry assert his claim and procure the mine to be adjudicated to him; but where no objection was interposed, and the person registering was the true discoverer of the mine, the causing it to be registered, or the formal declaration of his discovery, was the fulfillment of the condition established by law upon which his inchoate right as a discoverer became a perfect right of property (although until the pit was dug he was not entitled to a judicial delivery of possession, nor could he alienate the mine). And the register itself, or the record of the procedure, became his fundamental title *paper*, or *evidence of his title*, for it established judicially the fact of the discovery, and the fact that he had declared it as required by law.

I have thus endeavored to arrive at a clear conception of the nature and effect of the registry of a mine, and of the rights of a discoverer, that we may be better able to judge of the validity of the alleged registry by Castillero, and correctly to estimate the equitable or inchoate rights he may have acquired as the discoverer of a new mine.

Having premised this much as to the rights of a discoverer, and the nature, objects and effect of a registry we will now particularly consider the provisions of the articles under examination.

It will be observed, that to effect a registry, and to entitle himself to the judicial delivery of possession of the mine, the

only acts required of the discoverer were: 1st, his appearance before the Deputation, with a written statement of the facts necessary to set forth; and 2d, that he should within ninety days thereafter, make a pit in the vein of his registry of the required dimensions.

The noting in the book of registry of the contents of the statement, the hour at which the discoverer presented himself, the notices for due information, etc., were acts to be performed by the Judge or Deputation. It would seem that any injurious effect on the discoverer's right by the omission of the first of these formalities, was intended to be provided against by the direction that the written statement should "be returned to him for his due security," and it is presumed, with a certificate annexed of the fact and time of its presentation.

We learn from Gamboa, that in 1727, the Viceroy Marquess of Cassa Forte issued an order, dated at Mexico, commanding the royal officers and justices to send an account of the mines within their several districts, whether at work or abandoned, etc.; and in case they should have no book of registry for the mines which might have been registered there, to form one with all possible dispatch, that an account might thus be obtained of all the mines in the kingdom, from which a general book might be made up, etc. "But we are not aware," says Gamboa, "that this order, so agreeable to the spirit of the Ordinances now under consideration, and so important to the interests of the revenue in a public, and of the subject in a private point of view, was soon carried into effect." We find here no intimation that the failure of the officer to enter the registry in a book in any way impaired its validity, and this, notwithstanding that the ordinance he was considering (Art. XIX,) expressly requires the Mining Administrators of each District to keep a book in which all registries made in such District were to be entered, and for this purpose the miners were required to send authenticated copies of such registry to that officer.

Gamboa goes on to observe, that "the original proceedings (diligencias) ought *not* to be given into the custody of the owners until the registry, etc., be made in the proper book; for

otherwise these important instruments would be exposed to the contingencies alluded to above, and very serious difficulties may arise in subsequent dealings in ascertaining whether the registry or denouncement was made with due solemnity, the time and manner of making it, the greater or less antiquity of the mine," &c.

This suggestion appears to have been adopted in the Ordinances of 1783, which provide, as we have seen, that the contents of the statement and the hour at which it was presented, shall first be noted in the book of registry, and the statement then returned to the discover "for his due *security*."

The registry having been effected, the working of the mine could lawfully be commenced at once, and within ninety days the pit was required to be dug. As soon as this was done formal possession could be given.

If, however, the party who had registered the mine failed to do this, his rights were, by the Ordinances of 1584, forfeited and the mine might be denounced by and adjudged to another. As, however, from the nature of the vein, a pit of the depth of three estados might be wholly unnecessary, or the hardness of the rock, the caving in of the pit, the breaking out of springs of water, &c., might prevent the digging of the pit within the time limited, it was provided by the ordinance, that the justice, on an application made to him, and an investigation, might dispense with this requirement of the law, or enlarge the time for its fulfillment, as might be necessary.

In the Ordinances of 1783, the penalty of forfeiture is not in terms imposed for the omission to dig the pit within ninety days. It is presumed, however, that a breach of so positive and important a provision of law would, if without excuse, under the later ordinances have rendered the mine liable to denouncement.

By Art. 4, of the Ordinances of 1783, the pertenencias of the mine were required to be measured, and the stakes fixed in the boundaries at the time possession is given.

By the Ordinances of 1584, the miner was not obliged to do this, until cited by some neighboring miner "who asked for

stakes. Ten days were then allowed him to select the ground he might prefer, or, using our mode of expression, to *locate* his pertenencias—subject, however, to the condition that his original pit of possession, or fixed stake, should be within the limits of the boundaries he might select. If he failed to make his selection within ten days, his boundaries were established by the justice. But this designation of his pertenencias was not final; for he might at any time afterwards, on discovering the true course of the vein, &c., apply to have his stakes bettered (*mejorar las estacas*), and his boundaries might be altered in any way not injurious to the neighbor, between whose mine and his own the boundaries had already been established.—1 Heathf. Gamb., pp. 297, 298, 325; 2 Heathf. Gamb., p. 10.

The frauds and litigation to which this practice gave rise led Gamboa to suggest that every one should, by positive ordinance, be required to set out his boundaries at the time possession was given, under pain of incurring the forfeiture of the mine and of being *ipso facto* deprived of it, even though not denounced by any other party. 2 Heathf., pp. 10, 11.

This suggestion was adopted in the Ordinances of 1783, except that the omision to set out the boundaries at the time possession is given, was not declared to forfeit the mine *ipso facto*.

But, notwithstanding this establishment of boundaries, the miner could improve the location of his stakes (*mejorar las estacas*) or change his boundaries by the authority of the Deputation of the District, provided it could be done without injury to his neighbors, who were to be summoned and heard in the matter. Ord. of 1783, art. 11, Halleck's Transc., p. 236.

It thus appears that the giving possession was, under the Ordinances, a formal proceeding, like a livery of seizin, of which the measurement of pertenencias, or the establishment of boundaries, did not of necessity form a part; and that although these acts were required to be done by the Ordinances of 1784, their omission did not forfeit the right of property acquired by the registry; still less does it appear that their performance was a condition precedent to the vesting of the title.

In all cases where land was granted under the Mexican colon-

ization laws, a formal judicial delivery of possession was in strictness required. But it has never been held by the Supreme Court that this formality was necessary to vest the title or right of property; and in the majority of cases passed upon by this Court it was not given. In its own nature, it was an act which supposed the existence of a title acquired, but had no effect in conferring one, that having already been done by the concession or grant. I see no reason to make any distinction between the judicial delivery of possession of an agricultural grant and that of a mine, or for considering that the omission of that formality would be fatal to a right of property already acquired in the one case more than in the other.

We shall see, however, when we examine the proofs in this case, that the Alcalde, accompanied by witnesses of assistance, gave to Castillero judicial possession of the mine he had discovered, as well as of three thousand varas in all directions from it, which he undertook to grant him; that no pertenencias were measured or stakes fixed, but that Castillero had already commenced working the mine and had dug a pit, the precise dimensions of which do not appear; that he continued in possession, and working his mine, with the full knowledge not only of the authorities of the Department to whom he made known his discovery, but of the American Consul, and the inhabitants generally; and that this possession has been retained by his assigns and representatives to this day.

I proceed to consider the evidence as to the registry of the mine by Andres Castillero, and having ascertained what was in fact done by him, to determine its validity and effect.

The documents relied on by the claimants as constituting the registry of the mine of New Almaden, are:

1st. A written statement by Andres Castillero, addressed to the Alcalde of the First Nomination of the Pueblo of San José, dated November 22d, 1845, setting forth his name, office and residence, and the fact that he had dicovered a vein of silver with *s. ley* of gold on the land of the retired sergeant José Reves Berreyesa, which he desired to work in company. He

therefore requests the Alcalde to fix up the proper notices in order that his right might be made sure when the time for giving the judicial possession should arrive.

2d. A second statement addressed by Castillero to the same officer, and dated December 3d, 1845, setting forth that on opening the mine previously denounced by him he had taken out, besides silver with a ley of gold, liquid quicksilver. He therefore asks the Alcalde to unite this representation to the previous denouncement and to place it on file.

3d. The act of juridical possession. In this document the Alcalde recites:

"There being no Mining Deputation in the Department of California, and this being the only time since the settlement of Upper California that a mine has been worked in conformity with the laws, and there being no Juez de Letras, (Professional Judge) in the Second District, I, the Alcalde of First Nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office, for want of a Notary Public, there being none, for the purpose of giving juridical possession of the mine, known by the name of Santa Clara, in this jurisdiction, situated on the land of the retired Sergeant José Reyes Berreyesa, the time having expired which is designated in the Ordinance of Mining for citizen Don Andres Castillero to show his right, and also for others to allege a better right between the time of denouncement and this date; and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which the Court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the Republic, I have granted three thousand varas of land in all directions, subject to what the general Ordinance of Mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this Act of Possession being attached to the rest of the espediente, deposited in the archives under

my charge; this not going on stamped paper because there is none, as prescribed by law.

"Juzgado of San José Guadalupe, December , 1845.

"ANTONIO MARIA PICO.

"Assisting witnesses: Antonia Suñol,

"José Noriega."

These documents are produced from the Recorder's Office of Santa Clara county. They were found in the Mayor's office at that place in 1850, by Capt. H. W. Halleck, and by the Mayor transferred to the Recorder's office, where they now remain. It appears that a large portion of the archives or papers belonging to the former Alcalde's office in San José, were deposited in the Mayor's office of that place, a knowledge of which circumstance induced Capt. Halleck to institute a search in the latter place, which resulted in the discovery of the document.

The espediente thus produced contains several papers besides those enumerated above. These papers will hereafter be referred to.

In investigating the genuineness of these documents, it will be convenient to consider:

1st. The proof of the signatures attached to them.

2d. The evidence tending to establish that the documents were executed at the time they bear date, and were filed or archived in the Alcalde's office. And

3d. The proofs which show that, in fact, the mine was discovered and denounced, and the judicial possession given, as stated in the Act of Possession.

The Act of Possession is signed by Antonio Maria Pico, as Alcalde, and by José Noriega and Antonio Suñol, assisting witnesses. All these persons have been sworn, and testify to the genuineness of their signatures, and that they were affixed on the day the instrument bears date. The genuineness of these signatures, and that of Castillero, is also proved by other witnesses.

I do not understand that the fact that the instruments were signed by the parties whose names they bear, is seriously questioned, as all of them, except Castillero, were produced, and

testified not only to their own signatures, but to the facts which the documents recite. The theory of the Government, which supposes these statements to be false, must admit their readiness to affix their names to ante-dated documents.

The real questions, therefore, are, *when* were these documents prepared and signed? and *when* were they placed in the Alcalde's office?

2. On this point we have, as before stated, the evidence of Pico, the Alcalde, and the two subscribing witnesses, Sufiol and Noriega.

We have also the testimony of José Fernandez, who was Sindico del Juzgado and Escribano of the Court in 1845. This witness not only swears to the handwriting of the documents and the genuineness of the signatures, but states that he saw the espediente in 1845, when it was brought to him by Gutierrez, in whose handwriting the body of the decree is. He also swears that he saw it again in 1849, among the archives of the office, he being then Second Alcalde.

James W. Weekes, a witness called by the Government, testifies that he saw the espediente in 1846–7, when Burton was Alcalde, and in 1848, when he was himself Alcalde. He is unable, however, positively to identify the espediente now produced with the "little book" which he saw in the office when Burton was Alcalde. This witness, in 1848, certified, at the request of Mr. James Alexander Forbes, to a copy of the espediente. The copy was prepared by James Alexander Forbes from a document handed to him by Alexander Forbes, of Tepic, (who was then in California), not from the original in the Alcalde's office. The certificate of Weekes, that it was a faithful and literal copy of the latter document, was obtained, but no comparison was made of the copy made by Mr. Forbes with the original; the witness supposing, as he states, that it was correct. The copy thus certified to by Weekes differs from that found in the Alcalde's office in several particulars, which will hereafter be noticed.

The claimants have also produced the original inventory of papers and effects in the Alcalde's office, which, as was custom

ary, was on the 1st of January, 1846, signed by the out-going Alcalde, Pico, and receipted by the in-coming Alcalde, Chavolla.

This document is produced by the Clerk of the City of San José. It was found amongst other papers which had accumulated under the government of the Alcaldes of the Pueblo, and which now form part of the archives of the city. The signatures and rubrics of Pico and Chavolla to the inventory are proved; and the document itself is in the handwriting of José Fernandez, the Escribano or Secretary of the Juzgado.

In this inventory, amongst nearly a hundred entries of papers and records, and of the smallest objects belonging to the office —such as candlesticks, old knives, tables and benches—is found a note of a document entitled "Pesecion de la mina de Santa Clara á Don Andres Castillero."

No attempt has been made to impeach the genuineness of the signatures to this document, nor is it said that there is anything in the handwriting of the important entry in question, or in its position on this list, which could suggest the idea of a possible interpolation. Unless this entry be forged, it would seem conclusive evidence that a document of the kind described was on file in the Alcalde's office on the 1st of January, 1846.

Another inventony, of a similar kind, made on the 10th day of November, 1846, about nine months subsequently to the former, has been produced by the United States from the archives of San José.

In this inventory, no entry of the document in question is found. If the lists were in other respects similar, the omission of this one item might possess much significance. But the two lists seem to be different in many particulars; and though some of the entries are alike in both, several which appear in the first are wanting in the second. That all the papers mentioned in the first inventory must have existed on the files of the office, and should have been noted in the second inventory, is evident. When, therefore, we find not only the "Posecion" of the Mina de Santa Clara, but several other documents, omitted in the second inventory, we necessarily conclude that the latter was repared in the loose and inaccurate manner in which the

public business of such offices was usually conducted in those primitive times.

A striking illustration of the incompleteness of the second inventory is presented by the evidence offered by the United States. Three documents are produced from the Archives of San José, purporting to be orders by the Alcalde for the publication of the denouncements of mines—one of the lands of Justo Larios, another on those of José de J. Vallejo, and a third on the rancho de Ojo de la Coche. These orders are dated in April, March and June, 1846. I find no one of them noted in the inventory made in the succeeding November. And yet, both the documents and the inventory are produced as genuine by the United States.

I can see nothing, therefore, in the omission of the entry of the possession of the mine of Santa Clara in the second inventory which, in the absence of any suggestion that the handwriting or the color of the ink of the entry in the first inventory differs from those of the rest of the document, (as would be the case if it had been interpolated after any considerable interval,) or that the position of the entry on the list would have rendered such an interpolation possible, should weaken the force of the evidence afforded by the inventory that a document, purporting to be the possession of the mine of Santa Clara, was on file in the Archives of the Alcalde's office of San José on the 1st January, 1846

3d. As to the proofs which show the facts of denouncement, judicial possession and working of the mine about the time indicated by the documents.

We have already seen that the subscribing witnesses, the Alcalde and José Fernandez, testify to the fact that the possession was given as described by them.

It is shown, however, by evidence, which is uncontroverted, that in December, 1845, and early in 1846, Castillero and his partners were notoriously known to be working a mine of quicksilver, of which they claimed to be the owners by denouncement. That these facts were made known to the Governor of the Department, and by him communicated to the

Supreme Government. That they were known to the United States Consul, and by him communicated to his own Government, and also to a Cabinet Minister of the Government of the Sandwich Islands, with whom he corresponded, and by whom his letter was published in a Hawaiian newspaper of the date of July 25th, 1846, a copy of which is produced. That the mine was, in December, 1845, worked by Indians under the superintendence of Chard, an American employed by Castillero, who is produced as a witness, and whose employment continued until about the middle of 1846. That in December, 1845, it was visited and examined by Col. J. C. Fremont, to whom Castillero, who claimed to own it, explained the Mexican mode of acquiring titles to mines by denouncement and registry, but declined some overtures for its purchase made to him by Fremont.

Other allusions to and recognition of the possession and grant of three thousand varas, in letters, judicial proceedings, &c., at a late period, but previous to the supposed date of their fabrication, will subsequently be considered.

Among the documents alleged to have come from the City of Mexico, traced copies of which are exhibited, was a communication from Pio Pico, Governor of the Californias, to the Minister of Relations, dated February 13, 1846. In this letter Governor Pico states that he incloses a letter from Don Andres Castillero, apprising him of the important discovery of a quicksilver mine, and transmitting a sample of the quicksilver. He therefore begs the Minister of Relations to bring it to the superior knowledge of His Excellency the President, &c.

On the margin of this letter is the usual note, stating its reception on the 6th of April, 1846, and that it is noted with satisfaction, &c. The letter of Castillero alluded to in the foregoing, dated 10th December, 1845, is also produced from the Mexican Archives. On searching the Archives in this City, for records of this correspondence, there was found the borrador, or office copy, of the letter from Pio Pico, and a letter from Castillero—not the one inclosed by the Governor in his communication to the Minister of Relations, for of that, he states in that communication, he sends the original; but a subsequent letter

dated December 15th, 1845. In this letter he states: "I have the satisfaction of informing you, if you have not received my other letter through the Prefecture, that I have discovered," &c., repeating substantially the contents of the former letter, which had, in fact, been received and inclosed to the Minister of Relations. It is not disputed that these documents are in the Archives. The borrador, or draft, of Pico's communication to the Minister, is in the handwriting of Olvera, who was Secretary of the Assembly at the time.

There was also found, at the same time, by Mr. Hopkins, the Keeper of the Archives, amongst those records, a letter from Manuel Castro, the Prefect of the Second District, to the Secretary of the Departmental Government, dated December 31, 1845. In this letter he states that "Castillero has denounced and is now working a quicksilver mine;" and after falicitating the Secretary, and through him the Governor, on so beneficent a discovery, he adds, that he incloses a petition by Castillero for two square leagues of land adjacent to his mine. A borrador, or draft of the reply of the Secretary to this letter is also found in the archives, but it appears to have been cancelled by black lines drawn transversely.

The handwriting and the signatures of these documents are proved by Pio Pico, who also states his recollection of having dispatched J. M. Covarrubias with his letter of the 13th of February, 1846, to the Minister of Relations, and the bottle of quicksilver sent to him by Castillero.

The testimony of Pico on this point is corroborated by that of José M. Covarrubias, who swears that he left San Pedro in the schooner Juanita, Captain Snook, on the 14th of February, 1846, taking with him the Governor's dispatch, Castillero's letter, and a bottle of quicksilver, all of which he delivered on his arrival at Mexico to the Minister of Relations, Mr. Castillo y Lanzas. Files of the "Diaro Oficial," the Government newspaper, published in Mexico, and of the "Monitor Republicano," and the "Republicano," also published in Mexico, are produced, and under the heading of marine news there are found notices of the arrival of the "Juanita," Captain Snook, at Mazatlan, on the 2d

of March, 1846, twelve days from San Diego; of her departure on the 12th of the same month from Mazatlan for San Blas, having on board as passengers José Maria Covarrubias and others.

It cannot, therefore, be doubted that the letter of Castillero of the 10th of December, 1845, a traced copy of which is produced from the Mexican Archives, was in fact sent to Governor Pico, and by him transmitted in February, 1846, to Castillo Lanzas, Minister of Relations, together with the dispatch, the borrador of which is found in the archives in this city, and a bottle of quicksilver.

There are also produced by the claimants two letters from Castillero to M. G. Vallejo, of Sonoma.

In the first of these, dated December 2, 1845, Castillero says: "While waiting for the time of my departure, I have employed myself as a miner, having extracted from the same vein quicksilver, silver, and gold, in surpassing quantities."

In the second letter, dated December 21, 1845, he, amongst other things, informs Vallejo that he has found such abundance of quicksilver that he has extracted twenty pounds of it from twenty arrobas of ore, &c.

These letters are produced and proved by General Vallejo. I do not understand that the genuineness of Castillero's signatures to them is disputed. As Castillero left California in the spring of 1846, and has never returned, they must have been written about the time they are dated, unless we suppose they have since, and after an interval of many years, been written in Mexico, ante-dated, and sent on to Vallejo to be produced by him—a supposition which the contents of the letters and the allusions in them to personal matters and contemporaneous events of slight importance render wholly inadmissible. There is also produced by the claimants a copy of the *Polynesian*, of the date of July 25th, 1846, which contains a letter from G. P. Judd, the Minister of Finance of the Hawaiian Kingdom, to the editor of the newspaper, inclosing a letter received by the Minister from Thomas O. Larkin, United States Consul at Monterey, dated June 24, 1846. In this letter, which is also published in the *Polynesian*,

Mr. Larkin informs Mr. Judd of the discovery of a quicksilver mine seventy miles north of Monterey, and states, that in 1845, "a Mexican being in the vicinity examined the rock and immediately denounced the place before the nearest Alcalde, and then made known what it contained. The owner, with a priest, in a small and imperfect manner has commenced extracting the metal." After describing the process adopted by them, he adds: "They obtain about fifteen per cent. of the metal."

The receipt of this letter in the Sandwich Islands is sworn to by the editor and publisher of the newspaper. He is wholly unimpeached. The fact that it was published in the newspaper on the day alleged, is sworn to by a gentleman of San Francisco, who read it, and whose attention was particularly drawn to it. A copy of the paper is produced and filed. From among the papers of the late Mr. Larkin is produced, by his son, the reply of Mr. Judd to his father's communication. The reply is dated July 20, 1846. It acknowledges the receipt of Larkin's letter of the 24th ultimo, (June,) with a specimen of the ore, and it states that he had sent it to the editor of the *Polynesian* for insertion. The handwriting and signature of Mr. Judd are proved by persons intimate with him.

It has already been mentioned that files of several Mexican newspapers, published in 1846, have been produced by the claimants. In the "Diario del Gobierno de la Republica Mexicana," of the 27th December, 1846, we find credited to the "Espia de la Frontera," a newspaper not produced, a notice of the acccount given in the "Polynesian," of the 24th July, of the discovery of a quicksilver mine seventy miles north of Monterey, and the same notice purporting to be taken from the same paper, the "Spy of the Frontier," is found in the "Republicano," of the 9th December, and in the "Monitor Republicano," of the 6th.

It is unnecessary, however, to dwell on these incidental corroborations; for the fact of the reception of Larkin's letter by Mr. Judd, and its publication in the *Polynesian* cannot be doubted.

The claimants have also produced from the files of the State Department at Washington, extracts from official dispatches of

Mr. Thos. O. Larkin to the then Secretary of State. These extracts are certified by Mr. Cass, November 28, 1859.

The first dispatch of Mr. Larkin is dated May 4, 1846.

The extract produced states that—

"Near the Mission of Santa Clara there are mountains with veins of quicksilver ore, discovered by D. Andres Castillero, of Mexico, in 1845, which the undersigned has twice seen produce twenty per cent. of fine quicksilver, &c. * * * * * * * * * By the laws and customs of Mexico respecting mining, every person or company, foreign or native, can present themselves to the nearest authorities and denounce any unworked mine. The authorities will then, after the proper formalities, put the discoverer in possession, &c. * * Up to the present time there are few or no persons in California with sufficient energy or capital to carry on mining, although a Mexican officer of the army, a Padre, and a native of New York, are on a very small scale extracting quicksilver from the San José Mine."

There is also produced from the consular book of Mr. Larkin, a dispatch addressed by him to the American Minister at Mexico, dated April 3, 1846.

After mentioning the intended departure of Don Andres Castillero from this port (Monterey) in a few days, for Acapulco, on board the Hawaiian barque Don Quixote, as Commissioner to Mexico, from General José Castro, and that he would arrive in Mexico by the 25th or 30th of this month, (April,) Mr. Larkin says: "At the town of San José, eighty miles from Monterey, Don Andres Castillero has discovered a quicksilver mine. The ore produces from fifty to sixty per cent. I have seen him, from an old gun-barrel, in thirty minutes run out about thirty per cent. in pure quicksilver. This must be a great advantage to California." In a letter to Captain Montgomery, of the U. S. ship Portsmouth, dated May 2, 1846, Mr. Larkin communicates to that officer substantially the same information.

These extracts from Mr. Larkin's correspondence are important, not only as showing that the mine had been discovered, and was being worked in the spring of 1846, but that the mode of acquiring a mine, as understood by Larkin, was precisely that

alleged to have been adopted in this case. And further, that "the officer," the "Padre," and "the native of New York," spoken of as working the mine, were undoubtedly Castillero, Padre Real, and William G. Chard, as will hereafter appear.

The whole official dispatch of Mr. Larkin to the Secretary of State, is produced by the son of the former, from the letter-book of his father. The portions extracted and certified to by Mr Cass are all that is important to notice.

That the mine was worked by Castillero in January, 1846, is shown by the deposition of Col. Fremont.

That gentleman states, that in January, 1846, he visited the mine in company with Capt. Hinckley; that the latter introduced him to Castillero, the *owner* of the mine, who showed him the excavations, the heaps of ore, &c., and explained the process of extracting the metal. Impressed with the value of the mine, he spoke slightly to him about purchasing it; but Castillero was not disposed to converse on the subject. Castillero informed him that he had acquired his mine by denouncement, and explained the nature of the proceeding. Acting on this information, Col. Fremont subsequently denounced the mines upon his own property of Mariposa.

He also adds, that Capt. Leidesdorff, with whom he had spoken as to the purchase of the mine, supposed it might be effected for $30,000, "an immense sum of money in California in those days."

The working of the mine, so far back as December, 1845, is also proved by Mr. Wm. G. Chard. This witness testifies that he was employed by Castillero and the priest Don José Maria Real; that he went there to open the mine in November or December, 1845; that the metal was extracted by heating the ore in gun-barrels; that while working in this way, the possession was given, in December, 1845, or January, 1846. The witness enumerates among those present on that occasion, the Alcalde Pico, Suñol, Noriega, Fernandez, and the old man Berreyesa. He does not recollect to have seen Castillero on the ground when possession was given—a circumstance, as observed by counsel, not surprising—for Castillero, Chard states, was constantly coming and

going, and on one visit stayed there eight days; but the statement indicates the good faith of the witness in declining to swear to what he did not recollect.

Mr. Chard describes the operations at the mine. They were conducted by himself, another white man, a blacksmith whom they called Old Billy, and some Indians. He built a furnace and smelted the ore in some large whaler's try-pots, capable of holding three or four tons of ore. He remained in this employment until August or September, 1846.

Chard states himself to be a native of Columbia county, New York. He is evidently the "native of New York" to whom Mr. Larkin refers in his dispatch. His testimony is uncontradicted, and his character unimpeached.

There is much other testimony which corroborates the foregoing on various points, but which it is unnecessary to notice. It relates chiefly to the first visit of Castillero to the mine; his first experiments with the ore; his trip to Sutter's Fort and visit to Vallejo, at the baptism of whose child he was godfather, and who thus became his compadre, by which title he addressed him in his letters already cited; his return to Santa Clara, and the formation of the partnership between himself, Castro, Father Real and the two Robles, in November, 1845. As this writing of partnership is conceded to be genuine, and as it relates to the working of the mine of silver, gold, and quicksilver, on the land of José Reyes Berreyesa, the fact that the mine was discovered at that time must be taken to be admitted.

We thus find that early in December, 1845, the discovery and denouncement of the mine was made known to the Governor of California, and the information, with a sample of the quicksilver produced, by him transmitted to Mexico. That in May, 1846, Mr. Larkin officially communicated the fact of the discovery and the working of the mine, with an explanation of the mode of acquiring title to it under Mexican laws, to our Government.

That in June of the same year, he informed Mr. Judd of the discovery of the mine in 1845, and the fact that it had *been immediately* denounced.

That in January, 1846, Col. Fremont visited the works, and

conversed with the "*owner;*" that its reputed value was then about $30,000.

That it had been worked from the November or December preceding by a person employed by Castillero, and continued to be worked by the same person, until August or September, 1846.

It has appeared to me incredible that Castillero, a Mexican, acquainted with mining laws, should, on discovering so valuable a mine, have omitted to denounce it. That he knew the necessity of the proceeding, we learn from Fremont, as did also Larkin, *a foreigner*, as is shown by his dispatch.

To suppose that Castillero, with a knowledge of the great value of the mine, of the necessity and efficacy of a denouncement, neglected, notwithstanding his statements to the Governor, to take the simple proceedings he is alleged to have done, and that Larkin was entirely mistaken as to the fact of his having done so, is to suppose what I cannot but consider a moral impossibility.

I am aware that the fact that the mine was denounced by Castillero, and claimed and worked by him as owner, does not necessarily show that a juridical possession of it was given, or that the record of that possession is genuine. It is shown, however, by evidence in part introduced by the United States, that the juridical possession, as alleged to have been given, was recognized and alluded to in the correspondence of the parties, and in official acts of Alcaldes, before the date at which, on the hypothesis of the United States, the forgery was committed.

So early as January 30th, 1846, James Alexander Forbes, in a letter to Eustace Barron, of Tepic, apprises the latter that "D. Andres Castillero, a sort of Commissioner from the Mexican Government, is now working a quicksilver mine near the Mission of Santa Clara, which has yielded forty per cent. upon the assay of mineral employed;" and on the 5th of May, 1847, the same person, who had in the interval been placed in charge of the mine, in a letter to Alexander Forbes, who had become a part owner, urges him "to obtain from the Government of Mexico the unqualified ratification of the *judicial possession which was*

given of the mine by the local authority of this jurisdiction, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverer." The fraudulent nature of this suggestion is obvious, but it nevertheless implies that a juridical possession and a gratification of three thousand varas had already been given, a ratification of which was thought necessary.

In the preceding March, the same person, together with Castillero, Castro, Real, and the Robles, had been sued by the owner of an adjoining rancho for working on it contrary to law. It would seem from the imperfect record of that suit, produced from the archives of the Alcalde's office, that a survey of the mine was ordered and the plaintiffs mulcted in costs; a result which could hardly have occurred if the persons working the mine on the lands of another had been destitute of record evidence of their rights. The fact that a survey of the mine was ordered, would seem to be a recognition of the mine owner's right to his mine, and that the boundaries of his possession were capable of being ascertained.

On the 14th of August, 1847, allusion to this suit, and a still more explicit reference to the juridical possession, is made in an official letter of James Alexander Forbes, then H. B. M. Vice-Consul for California, to John Burton, Alcalde.

In this letter Mr. Forbes informs the Alcalde that "two persons have commenced digging a pit, by the direction of Mr. Cook (the plaintiff in the former suit), within *the limits of the juridical possession of the mine.*" He adds, "Permit me to *refer you to the documents which exist in your office,* upon which was founded your conviction of the justice of your decision in March last in relation to the claim of Mr. Cook, and to request that you will be pleased to adopt such measures for the protection of the owners of the mine, and of those who are legally interested in the same, as you may deem most conducive to that end."

The genuineness of this letter is not disputed. It will be observed that, though written in August, 1847, it refers the Alcalde to documents existing in his office upon which a decision rendered in the March preceding was based.

On the 19th of January, 1848, Alexander Forbes, who had come to California, made a petition to the Alcalde, Weekes, to "visit and inspect the mine, as required by the Ordinances, and to determine the direction and inclination of the vein, for the purpose of reforming and correcting (since there is occasion for it) the *boundaries of the former Act of Possession*, and to correct such other mistakes as may appear in it."

In conformity with this petition, the Alcalde proceeded to inspect the works; and having ascertained the true course of the vein, and admitted the right of the owner to an improvement of stakes (mejora de estacas), he established his boundaries, assigning to him *four pertenencias*, the location of which he designates but without prejudice to the right and title of the mine (siendo constante el derecho y titulo de la mina) to the gratification or gift (gracia) of land conceded in the original Act of Possession.

Whether the four pertenencias which were thus designated were all which, under the ordinances, a discoverer, though working in company, was entitled to, we will hereafter consider. The only purpose for which the proceeding is now referred to, is to show that its date (January, 1848) and about the supposed time of the alleged forgery, "an original Act of Possession," containing a "gracia" of land of a much larger extent, is plainly alluded to as existing; nor is the force of this fact weakened by the circumstance that Weekes, the Alcalde, may have been ignorant, and willing to comply with all that Alexander Forbes required; for the fact that the latter inserted such an allusion in the document he may have caused Weekes to execute, is at least evidence that at that early day he claimed that there was in existence an original Act of Possession, including a *gracia* of an extensive tract. It will be observed that the petition of Alexander Forbes to Weekes is dated January 19th, 1848. Its object was to procure the judicial ascertainment of the inclination and depth of the vein, to correct the boundaries of the former Act of Possession, and to decide upon an increase of pertenencias and the square corresponding to them. But if, at that very time, Forbes had already fabricated, or was about to fabricate, an Act of Possession, which was to be ante-dated and placed in the archives

where no document of the kind had hitherto existed, the application to Wilkes, and the designation of pertenencias by him, would be wholly superfluous, if not absurd; for in the forged paper which was to serve as the original Act of Possession by the Mexican authorities, the designation of pertenencias might have been inserted and the boundaries established in any way the forger might desire. All objections or doubts as to the authority of an American Alcalde to act under Mexican Mining Ordinances would thus have been avoided; and the same Alcalde who, according to the theory of the United States, was induced to recognize and affirm the existence of an Act of Possession, either not in his office or recently forged and placed there, could, with equal facility, have been brought to recognize an Act of Possession which should be free from the errors and uncertainties which he was called on to correct, and which should contain as many pertenencias as he was desired to designate.

Similar allusions to the original registry and Act of Possession are found in various judicial proceedings during the year 1849. On the 18th October of that year, Robert Walkinshaw, between whom and James Alexander Forbes a contest for the possession of the mine had arisen, filed a complaint against the latter, averring himself to be "the owner of one-eighth of the mine, *by title derived under the original act of registry.*"

Previously to the filing of this complaint, Mr. Horace Hawes, a lawyer of much acuteness, and very familiar with Mexican law, had denounced the mine before the Alcalde for abandonment. In this denouncement he describes it "as known in *its original title of registry* as the Mine of Santa Clara."

In the proclamation issued thereupon, on the 23d October, 1849, the Alcalde describes the mine "as known and designated in its *original act of registry* as that of Santa Clara, and now known by the name of New Almaden." On the refusal of the Alcalde to take jurisdiction of the proceeding, Mr. Hawes files a protest, dated 15th November, setting forth that, "besides having failed to work the mine, the alleged owners had never acquired any title thereto, by *reason of the insufficient registry*

thereof, which he stands ready to prove in Court by witnesses records and documents," &c.

As Walkinshaw, though he had originally obtained possession of the mine as the agent of Castillero and his assigns, was in these proceedings endeavoring to acquire the mine for himself, and co-operating with and assisted by his attorney, Mr. Hawes, these references to the original act or title of registry conclusively show that such a document was on all sides admitted to exist, though Mr. Hawes maintained it to be "*insufficient*;" nor is it conceivable that when Hawes and Walkinshaw, by possessory suits, by denouncement for abandonment, by purchasing the lands of adjoining rancheros, &c., were struggling with so great pertinacity to obtain the mine for themselves, they should have utterly failed to disclose the fact, of which Walkinshaw could not have been ignorant, that no registry had ever been made, and that the document purporting to be the act of possession was a recent forgery, then lately interpolated among the archives.

In the correspondence between James Alexander Forbes and Alexander Forbes, and the other owners of the mine, the necessity of procuring fraudulent and ante-dated title papers from Mexico, is repeated and urgently represented. But the fraud recommended is the fabrication of an absolute grant of two *sitios* of land, and a ratification of "the acts done by the Alcalde in the possession given by him of the quicksilver mine in his jurisdiction."

Such are the very terms of the memorandum of "documents to be procured by Castillero," alleged by James Alexander Forbes to have been left by him in Tepic, in May, 1849. And in October of the same year, chagrined, it would seem, that his suggestions had not yet been acted on, he complains that he is obliged to depend on "the precarious and illegal possession of the mine granted by the Alcalde of this District to Castillero, who was in reality the judge of the quantity of land given by the Alcalde."

Whether the doubts here expressed as to the legality of the possession be well or ill-founded, it is clear that in this most

confidential communication, where no motive existed for suppressing or distorting the facts of the case, that possession is treated as having actually been given, and the record of it as actually existing and genuine, though the possession itself is considered precarious and illegal.

Having thus reviewed the evidence which establishes the genuineness of the act of possession by the testimony of the witnesses to the document; of those who were present when the possession was given, and who testify to the fact; by the production of documents from the Archives of California, and the correspondence, both private and official, of the United States Consul at Monterey; by the testimony of unimpeached witnesses that the mine was, early in 1846, claimed by and recognized as belonging to Castillero, and worked by him as such; by the proofs afforded, by a correspondent admitted to be genuine, that the act of possession was treated and spoken of by the parties, when writing in the most confidential manner, at a time when they could not have been ignorant of the facts, as genuine, though perhaps invalid, and was so recognized in various judicial proceedings by persons who would certainly have discovered and denounced any forgery which might have been committed; and finally, the intrinsic improbability of the supposition that Castillero would have omitted to denounce a mine, of the great value of which he was fully aware, and the means of acquiring a title to which, under the Mining Ordinances, he was well acquainted with, as was also Mr. Larkin, a resident foreigner. I shall next consider more particularly the nature and contents of the documents produced by the claimants, as well as the principal objections to them urged by the counsel for the United States.

These documents are four in number. The first is the original espediente, produced from the Archives of the City of San José, and discovered by Capt. Halleck, in 1851, among the Archives of the old Alcalde's office, in the office of Belden, the Mayor of San José.

This document contains the two representations of Castillero,

and the act of possession with the original signatures of Castillero, the Alcalde, and the assisting witnesses.

It also contains a petition of José Castro, dated June 27, 1846. In this petition, Castro states that he represents the person and rights of Capt. D. Andres Castillero, and other individuals composing the company in the quicksilver mine which Señor Castillero denounced on the 3d day of December, 1845, and of which possession was given on the 30th of the same month and year. He therefore claims that, in conformity with the Mining Laws, there be given three pertenencias in continuation of the first; and that this petition be attached to the espediente of denouncement, and remain among the Archives. On the margin of this petition is an order, signed "Pacheco," directing it to be archived as prayed for.

If this document be genuine, it affords important evidence of the date of the judicial possession.

The handwriting of the petition is sworn by Fernandez to be that of Benito Diaz. The signature of Castro is proved by himself, and he testifies that it was signed at its date, having been prepared from a draft left with him by Castillero. He also states that the handwriting of the marginal order is that of Salvio Pacheco, and the signature that of Dolores Pacheco; and that after sending the petition to the Alcalde he left Santa Clara, but was informed, on his return, by the Alcalde, in presence of Manuel Castro and Juan B. Alvarado, that this petition had been granted.

Salvio Pacheco is also produced, and testifies to his own handwriting and the signature of his brother, the Alcalde. He swears that the order was written at its date. As this witness has been produced by the United States to sustain the character of a witness impeached by the claimants, it is presumed that his own character is not liable to the imputations from which the United States rely on him to shield another.

The only evidence tending to show that the petition was not written at its date is that of Benito Diaz. He does not precisely specify the time at which it was written; but it can be gathered

from his testimony that it was at the end of 1847, or the beginning of 1848.

But this witness is, unfortunately, too well known to the Court to permit any reliance to be placed upon his unsupported declarations. I have not been able exactly to understand on what theory this petition is supposed to be forged.

If the act of possession be genuine, it is immaterial, so far as the rights of the parties are concerned, whether the petition be ante-dated or not; but it is not easy to imagine the motive of the parties in fabricating a petition addressed to an Alcalde who had ceased to be in office, and whose ante-dated marginal order did not even purport to convey any rights. Had the marginal order contained a grant of an increased number of pertenencias, some motive for fabricating it would have existed; but it merely directs the petition to be archived; and the application for an increase of pertenencias is in substance renewed in the petition of Alexander Forbes to Weekes, made in 1848, at the very time when we are asked to suppose this petition of Castro was fabricated. If the act of possession be genuine, and the Castro petition be ante-dated, the conduct of the parties seems to me inconsistent, absurd, and inexplicable. But if the act of possession was itself fabricated in 1848, and did not exist at the date when the Castro petition was fabricated, the acts of the parties are equally incomprehensible. Of what use could it be to have a petition for an increase of pertenencias included among archives which contained no registry or denouncement, or grant of any pertenencias whatever? It may be said that the fabrication of the act was then in contemplation; but if so, why not make that document contain all that was desired as to the number of pertenencias, designation of boundaries, &c? Why accumulate superfluous forgeries, involving the necessity of new perjuries, and largely increasing the risks of detection; and why resort to the proceedings had before Weekes for the ascertainment of boundaries and an increase of pertenencias, when it was known that the fundamental title to the mine had yet to be forged, and might be framed in any way to suit the interests of the parties?

The counsel for the United States has urged upon the Court the inconsistency between the petition of Castro for three additional pertenencias and the supposition that a concession of three thousand varas in all directions, amounting to nine hundred pertenencias, had already been obtained. But this objection, whatever be its force, seems to admit the genuineness of the Castro petition; or, it attributes to the fabricators the absurdity of contriving at the same time two forged documents repugnant to each other. That an act of possession, either genuine or forged, was in existence when Castro's petition was drawn, is evident, for the dates of the denouncement and of the judicial possession are given. To what end then, file a petition which could have no other purpose than to furnish a plausible argument against the genuineness of the previous concession of three thousand varas?

From all the evidence, and on consideration of all the circumstances connected with this petition, I confess myself unable to discover any sufficient reasons for considering it forged.

The claimants have also produced a document alleged by them to have been delivered to Castillero shortly after the date of the judicial possession.

It contains certified copies of the two representations of Castillero, purporting to have been made on the 13th January, 1846, and a duplicate original of the act of possession signed by Antonio Maria Pico. Appended to these is a receipt by Pico for twenty-five dollars, dated December 30, 1846.

This document was recently found among the papers of Robert Walkinshaw, deceased. It is shown in the deposition of Hall McAllister, Esq., who was counsel for Walkinshaw in a suit respecting a share of the mine, that the document was placed in his possession by Mr. Walkinshaw early in the year 1858, and that it remained in his office until May, 1858, when he delivered it to Walkinshaw.

The genuineness of the signatures is testified to by all the assisting and subscribing witnesses, except José Suñol, who is dead.

This espediente does not contain the petition of Castro, for

the certified cópies appear to have been made on the 18th January, while the Castro petition was not filed until the June following. There is one circumstance, however, which, though entirely accidental, affords important proof of its genuineness. In copying the first representation of Castillero, it appears that a line was omitted. This has been supplied by another hand, and the handwriting is that of Castillero. As Castillero left California early in 1846, and has never returned, we must suppose that this interlineation was made before he left, or else that the document was fabricated here at a later period, sent on to Castillero in Mexico, interlined by him, and returned to Walkinshaw's possession before January, 1853, when he delivered it amongst other papers to Mr. McAllister. But that he was in possession of "some important papers of the original registry of the mine," in 1849, appears from James Alexander Forbes' letter of October 28, of that year; and it also appears from the certified copy made out by Weekes on the 20th January, 1848, that the espediente we are now considering must have been the document which James Alexander Forbes copied, and which Weekes erroneously certified to be a literal copy of the original in his office. The year in which it is supposed by the Government that these titles were fabricated, in 1848. How, then, could this espedient have been made, certified to by the subscribing witnesses, sent to Castillero, interlined by him, and returned to California in time to be copied by Forbes, and certified to by Weekes, on the 20th January, 1848? And why, if the Castro petition had then recently been written by Benito Diaz, and ante-dated, was it not included in this espedient, concerning which so much pains were taken?

The omission of the Castro petition in this espediente seems to me, I confess, an important corroboration of the statements of the witnesses who prove the genuineness of the signatures.

There is also produced the copy of this espediente, by Weekes, already alluded to. Weekes himself swears that he made it, and he is corroborated by James Alexander Forbes. I do not understated this fact to be disputed.

The claimants have also produced a copy of the original espe-

diente, certified by Pedro Chabolla, on the 13th August, 1846, to be a literal copy of the original acts (autos) in the archives of his office.

The whole of this copy is proved by Salvio Pacheco, to be in his own handwriting, and to have been made at its date. It contains the Castro petition, which had been made in the preceding June, and attached to the original on file, and it even omits, like the original, the date of the act of possession—that date being on both papers December — 1845, and not December 30th, as in the testimonio or duplicate original given to Castillero. That the document was scrupulously compared is further evident from the fact that in the copy of the date of Castillero's first representation is the Mission de Santa Clara, November 22, de 845, instead of 1845—and on turning to the original, we find in the printed copy that the first figure of the date is separated by a comma from the three other figures. I have not had an opportunity to examine the original, which remains at San José; but it would seem from the printed Transcript that the date is written in an unusual manner, which has been either exactly reproduced or has led to the omission of the first figure in the copy.

It has been earnestly contended by the counsel for the United States, that the non-existence of the original espediente in the archives of San José, even so late as December 23d, 1850, is proved by the affidavit of Mr. Halleck, at that time, and since, Superintendent of the Mine, and counsel for James Alexander Forbes in a suit brought against him and Walkinshaw by the Berreyesa. In this affidavit, which was made in answer to an order obtained by the plaintiffs, in the suit upon the defendants, requiring them to produce the papers on which they intended to rely as a defence, or copies thereof, Mr. Halleck swears:

"That the defendants have exercised all due diligence to procure and produce said papers in Court, by writing immediately on the receipt of the above-mentioned order to the *parties in Mexico who hold them.* But to this date the defendants have not received them. * * *. And the defendants specify among others he following papers and documents as absolutely neces-

sary to them before they can proceed with the trial of this cause, viz.:

"1st. *The original denouncement of the mine of New Almaden, and the juridical possession given of the same year* 1845.

"2d. The confirmation of said denouncement and possession by the Supreme Government in 1846, and prior to the late declaration of war by the United States against Mexico.

"3. The original grant of land, including said mining possession, made by the Supreme Government of Mexico, prior to the declaration of war as aforesaid, to the owners of said mine."

It is obvious that this affidavit states that the original denouncement and judicial possession of the mine was then in Mexico, and not in the Alcalde's office. That Mr. Halleck, then lately appointed Superintendent of the Mine, might have been ignorant of the fact that those papers were among the archives of the Alcalde's office, is conceivable; and he may also have accepted the assurances of his client, James Alexander Forbes, that he had exercised all due diligence to procure them, as sufficient to authorize his affidavit of that fact; but it cannot be supposed that James Alexander Forbes could have labored under a similar misapprehension. We have already seen that in August, 1847, he had, in an official letter to Alcalde Burton, referred him to the documents existing in his office, upon which was founded his conviction of the justice of his decision in relation to the claim of Mr. Cook, in the preceding March.

In January, 1848, he had himself copied and procured Weekes to certify to the espediente containing certified copies of Castillero's representations and a duplicate original of the act of possession. This espediente has since been produced from among Walkinshaw's papers, and its possession by him, or his counsel, is traced back as far as 1853. The circumstance that it is interlined in the handwriting of Castillero, proves it to have been at some time in his possession. As Castillero left California early in 1846, it is in a high degree improbable that the document could have been fabricated here, sent on to him in Mexico, and returned before January, 1848, when it was copied by Forbes and certified; nor does such a hypothesis comport with the

theory of the United States, which supposes the forgeries to have been committed about the time of the Weekes certificates. It is almost equally improbable that this document, after being copied by Weekes, should have been again sent to Mexico, and returned to Walkinshaw in time to be found among his papers in 1853.

There is no reason to presume that the Weekes copy ever left this State. It was produced by the claimants when proceedings were first instituted before the Board of Commissioners, in 1852. It is clear, therefore, that as the order of the Court called for the documents on which the defendants relied, or *copies* thereof, it was easy for Mr. Forbes to have satisfied the order by furnishing the copy required.

It also appears from his own letters that he had already received a notarial copy of the Lanzas dispatch on which they rely. A copy of this could also have been furnished. We are thus compelled to seek for some other motive for withholding those copies which the order required, and which, on any theory of the case, he could readily have furnished. That motive seems to me apparent. From the 5th of May, 1847, up to the 26th of February, 1850, James Alexander Forbes had not ceased to urge upon his associates the necessity of obtaining fabricated documents of title. In his letter of February 26th, 1850, he again dwells upon the necessity of carrying his suggestions into effect, and specifies the required documents as follows:

"1. A full and complete ratification of all the acts of the Alcalde of this jurisdiction, in the possession of the mine.

"2. A full and unconditional grant to Castillero of two *sitios* of land, covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you at Tepic. Both of *these documents* to be of the proper date and *placed in the proper Governmental custody in Mexico.*"

On the 7th of April, 1850, Alexander Forbes, of Tepic, writes to James Alexander Forbes: "Mr. Barron and Castillero have arrived in Mexico, and have every prospect of finding the document you are aware of, and which will, of course, be forwarded as soon as possible"

When, therefore, in December 1850, James Alexander Forbes represented to Mr. Halleck, that papers had been sent for, and were daily expected from Mexico, it cannot be doubted that he referred to the documents, the fabrication of which he had so urgently recommended. The description of the expected documents in the affidavit, in no respect applies to the Lanzas dispatch; for the ratification, and the grant of two *sitios*, are evidently described as two separate instruments, and they are spoken of as "*of the proper date*," viz.: "prior to the late declaration of war by the United States against Mexico;" that is, prior to the 13th of May, 1846; whereas the Lanzas dispatch is dated on the 23d of May.

We have already shown that James Alexander Forbes could readily have complied with the order of the Court by furnishing "*copies*" of the denouncement and registry, and of the Lanzas dispatch, both of which he must have then had in his possession. The statements, therefore, which he made to his counsel, and on which the affidavit was founded, were evidently made for delay, and to enable him to receive the more full and explicit documents he so much desired. Such being the motive and intent of Mr. Forbes, the allegation that "the original denouncement of the mine was in Mexico," may well be taken as made in furtherance of the same object, and to give increased force to his showing, for the postponement which he was so anxious to obtain.

That Mr. Halleck should have embodied in an affidavit these representations of Forbes will, perhaps, not be surprising to any one acquainted with the facility, often too great, with which counsel receive and adopt in affidavits statements made by their clients in the progress of a cause. Such has seemed to me the more probable explanation of this affidavit. For, whatever may have been therein sworn to, I can see no reason for concluding, on the strength of that affidavit alone, and in the face of the mass of testimony which had been adduced to the contrary, that the espediente of the mining possession was not then in the Alca de's office.

It was also strongly urged by the counsel of the United

States, on the hearing, that the non-existence of the alleged act of possession and concession of three thousand varas was proved by the acts of the parties themselves and their dealings with each other.

The circumstances chiefly relied on were—

1. The fact that in the Castro petition, drafted by Castillero, three pertenencias are asked for, in continuation of the one already obtained.

2. That in the power of attorney executed by Castro, on the 12th June, 1846, to McNamara; in the contract by McNamara, under the power of attorney, executed in Tepic on the 28th November, 1846; and in the ratification of that instrument by Castillero in Mexico, on the 17th December, 1846, the mine is spoken of as consisting of only three pertenencias, while the grant of three thousand varas is not mentioned.

3. That in the numerous deeds and acts of sale by which barras or shares in the mine were transferred, the writing of partnership executed by the original owners of the mine is the only document referred to, no allusion is made to the possession of three thousand varas, or to any tract of land whatsoever; and the Espediente of Registration is, for the first time, mentioned in the deed from Padre Real to Walkinshaw, dated August 9th, 1849.

These objections, so far as they relate to the mention of the pertenencias, will more conveniently be considered in treating of the legal effect of the judicial possession; but in respect to omission of all allusion in the deeds, either to the registration or to "lands," it is to be observed that to many of these deeds, James Alexander Forbes was a party. We find by his letter of May 5th, 1847, that at that date the "ratification" of three thousand varas of land given by the Alcalde, and the concession of two sitios of land to Castillero, were known to and spoken of by him as having actually been made, the object of that letter being to urge the necessity of obtaining an unqualified ratification of the mining possession, and a positive, formal and unconditional grant of the two sitios. Similar references to the act of possession, and the order of Castillo Lanzas, occur through-

out his correspondence. And as we have already seen, the former document and the fact of registration is referred to in various legal proceedings by Forbes and Walkinshaw in the years 1847-8; as also in Alexander Forbes' petition to Weekes, in January, 1848.

The inferences, therefore, which might otherwise be drawn from the silence of the deeds on this point, seem to be repelled by the fact that, in letters and various judicial proceedings, the registration, the grant of three thousand varas, and the concession of two leagues, are frequently spoken of and claimed to have been made.

It will be noticed that in the first representation of Castillero, dated November 22, 1845, the mine is described as a vein of silver with a ley of gold; and, by his second representation, it appears that he subsequently, and at some time previous to December 3d, discovered it to contain quicksilver. The writing of partnership, however, dated November 2d, describes a silver mine with a *ley* of *gold and quicksilver*, showing that twenty days previous to his first denouncement he must have been aware of the existence of quicksilver in the vein. This discrepancy is forcibly urged by the counsel of the United States, as affording conclusive proof that the alleged denouncements are forgeries.

It seems, from the evidence produced by the claimants, that in the month of October, 1845, Castillero and Castro set out from Monterey, to visit General Vallejo, at Sonoma, and General Sutter, at Sutter's Fort. On their way, Castillero, at the suggestion of Castro, examined the spot which, as the latter told him, had for a long period been reported to be a mine, but of what kind was unknown. He assayed the ore, and found a little gold and silver, and a small quantity of quicksilver. The latter he considered of no importance.

The party proceeded to Sonoma, and thence to Sutter's Fort, and set out on their return on the 12th November. On reaching Santa Clara, Castillero made further assays of the mineral. "He then discovered," says Castro, "abundance of quicksilver, denounced the mine as a quicksilver mine, and formed a com-

pany to work it." But this statement is evidently erroneous, for the writing of partnership is dated November 2d, and, if executed at its date, must have been made when the parties were on their way to Sonoma and Sutter's Fort, and not on their return from the latter. But if Castillero, at the latter date, had discovered quicksilver in large quantities, how can we account for his first representation, which omits all mention of that metal, nor for his second representation which announces the discovery of it, as having been made after the date of his first representation, *i. e.* after November 22d.

It is quite probable, however, that Castro may be in error, if he means to state that Castillero discovered the abundance of quicksilver and denounced the mine as a quicksilver mine immediately on his return to Santa Clara, Castro himself went on, as he states, to Monterey. The party, having left Sutter's Fort on the 12th November, must have reached Santa Clara between the 16th and 20th. It may well be said, therefore, that Castillero made his first representation immediately on his arrival, and subsequently made the further assays spoken of by Castro, in consequence of which he prepared his second or amended denouncement. On this hypothesis we can account for his omission to mention the existence of quicksilver in his first denouncement, as he did not then know that it existed in sufficient quantities to deserve attention. But whatever explanation of this discrepancy be offered or conjectured, I have been unable to perceive how it furnishes the conclusive evidence of the fraudulent character of the denouncement, which the counsel for the United States supposes it to afford.

If these papers were forged about the year 1848, they must have been forged at a time when the character and great value of the mine were well understood. What motive, then, can be suggested for fabricating two representations, in one of which the existence of quicksilver in the vein was entirely ignored?

Impressed, as the parties must then have been, with the great value of the mine, as a mine of quicksilver, can it be supposed that, merely to give the appearance of truth to the documents

they were fabricating, they caused them to express a pretended ignorance of the nature of the vein?

Even if so refined and subtle a cunning could be attributed to them, the same cunning would not have suffered them to overlook the fact that the writing of partnership existed, which fixed upon them the knowledge of the existence of quicksilver in the vein twenty days before the date of the first denouncement.

I confess that, though unable to demonstrate how his discrepancy has occurred, I perceive in it rather what the ingenious counsel for the United States has on another occasion characterized as the "deshabille of truth," than that meretricious ostentation of consistency, which falsehood would not have neglected to display.

But the circumstance that I have found most difficult to account for, and which most strongly suggests suspicions as to the genuineness of the Act of Possession, is the failure of Castillero to exhibit, or even mention, it during his protracted negotiation with M. Negrete. The correspondence of the latter with his principal, Alexander Forbes, shows that Castillero was called on to exhibit his title-papers. He responded by producing the writing of partnership and, after a little delay, the Lanzas dispatch. He not only does not exhibit the "copia autorizada," which, if genuine, he must have received before his departure from California, but he does not even mention that he has been put in possession and received a concession from the Alcalde of a tract of three thousand varas in extent, nor that any such possession had been ratified by the Supreme Government. So far as appears from the instrument executed at that time, and the testimony of Mr. Negrete, the writing of partnership was the only document of title to the mine relied on, and an interest in the two leagues grant during the term of the lease is added as a kind of voluntary cession to the Aviadores. In all the deeds which passed between the parties for several years, no allusion whatsoever to the Act of Possession occurs, but the writing of partnership and a mine of three pertenencias are alone spoken of.

That the parties were ignorant of the precise number of pertenencias allowed by the law is not improbable, and that they

should have treated the mine as consisting of the number of pertenencias assignable to a discoverer, can be reconciled with the facts as they are claimed to have existed. But the omission of Castillero to exhibit the Act of Possession, which constituted his only title-paper for the mine, and the only evidence of his denouncement and registry, and which alone showed that the persons, or any of them mentioned in the writing of partnership, had any rights whatever in the subject-matter of their contract, is a circumstance which I have found it impossible to account for.

Even on the hypothesis that he had neglected to bring with him, through accident or otherwise, a copy of the Act of Possession, it would still seem almost inevitable that he should have given to Mr. Negrete some information of the existence of such a paper, and at least mentioned the Alcalde's concession of three thousand varas. No explanation of this circumstance is offered by the claimants. I have been much impressed with its significance. It might well seem to justify the inference, not that the mine was not discovered and worked as alleged, or that it was not in some manner denounced, or that the Alcalde did not give a possession, as sworn to by the witnesses—for of these facts, there can, I think, be no doubt—but that the record of the Act of Possession has been since fabricated and antedated.

But when we consider the vast number of perjuries and complicated forgeries which such a supposition involves, and the grave and almost insuperable objections which present themselves to any theory of forgery, no matter what date be assigned for its commission, and especially if we accept the date fixed by the counsel for the United States, (viz., subsequent to February 2, 1848,) it seems impossible, under the proofs, to adopt the hypothesis of the United States.

Our daily experience apprises us that events are constantly occurring which would, *a priori*, be pronounced in the highest degree improbable. That which is true does not always present the appearance of truth, and it is not usually safe to discredit positive testimony to a fact on an estimate of what would be likely to have happened.

But in this case, if, reasoning on the extreme improbability that Castillero would have failed to produce to Mr. Negrete the Act of Possession, if it existed, we adopt the conclusion that it did not then exist, we encounter improbabilities greater than those we are seeking to avoid.

For admitting, as we must admit, that he discovered the mine; that its great value, estimated by Col. Fremont at $80,000, was known to him; that he denounced it in some form, as is stated by Mr. Larkin to Mr. Judd, and to his own Government by himself, and by Castro to the Governor of California, as was notorious throughout the country—it is, as before observed, almost incredible that he should not have made the denouncement in writing, and substantially as is now claimed. If the papers were fabricated after February, 1848, how can we account for the copy certified to by Weekes in January of that year, and which must then have contained the interlineation in Castillero's handwriting, who was absent in Mexico?

How can we account for the useless forgery of the Castro petition, which the counsel for the United States allege to have been made by Diaz in 1847, and which speaks of the denouncement and act of possession, which had not yet been fabricated? Why, if the parties were then preparing their spurious documents, did they, at the same time, ask for additional pertenencias, when the documents they were forging could be made to express all that they desired?

How shall we explain the absence, throughout James Alexander Forbes' voluminous correspondence, of any reproach, or even regret, that the forgery had been so clumsily effected as to leave the Act of Possession "precarious and illegal;" how account for the allusions to the documents of registry in judicial proceedings, official letters of Forbes to the Alcalde, and the entire absence of any accusation or hint of forgery, when Walkinshaw, who must have been in the secret, was struggling so fiercely with Forbes for the acquisition of the mine?

These, and many other considerations which might be offered, are sufficient, without now alluding to the large number of witnesses who swear to the genuineness of the documents, to apprise

us that the theory of forgery is beset with greater difficulties than the supposition that Castillero, for some unexplained reason, omitted to produce or allude to the Act of Possession, which, nevertheless, existed.

Assuming, then, the genuineness of the Act of Possession, I proceed to inquire what this document and the proofs show to have actually been done—and what was its legal effect.

In the first place, it appears that the written statement required by Art. 4, tit. VI., of the Ordinances, to be made by the discoverer, was in fact presented by Castillero. The vein was described as situated on the lands of Berreyesa, and the discoverer declared that he wished to work it in company. The names of his partners were not stated as enjoined by the ordinances.

It does not appear that the corresponding entry, in a book kept by the Alcalde, was made, nor was the "statement returned to the discoverer for his" due security.

Whether notices were affixed, as required by the ordinances is perhaps not clearly established, although some witnesses testify to the fact.

It further appears, that within the ninety days limited by law a pit had been dug, the mine opened and working commenced, and that at the expiration of thirty-eight days from the date of the denouncement, judicial possession of the mine was given.

It is not pretended that any number of pertenencias were measured to Castillero when possession was given, nor that he was called to fix stakes in his boundaries, as directed by the ordinance.

It has already been shown that, by the spirit and terms of the ordinances, discovery was recognized as the true foundation of title to a mine. That the registration was but a formal an nouncement of the fact of discovery, and only required, in the language of Gamboa, three things to be manifested--"the person, the place, and the ore." That upon this declaration, the law itself annexed the title, and the mine was said not to be granted, but to be *adjudicated*, by the judicial tribunal which had jurisdiction in such matters. That from the moment of denounce

ment the discoverer had the legal right to commence working his mine, and was required within ninety days to dig a pit of certain dimensions under penalty of forfeiture of his right, but that as soon as this was done he was entitled to receive judicial possession of his mine; and this, notwithstanding that the period allowed for others to show a better right, had not elapsed.

It was also shown that under the old ordinances no measurement of pertenencias was required to be made when possession was given; though this was required by the Ordinances of 1783, the penalty of forfeiture was not by those ordinances annexed to the omission to do so, though such a provision had been recommended by Gamboa. It was also shown that the requirement of the ordinances with regard to noting the contents of a statement in a book, &c., was directory to the Alcalde, and that his neglect of duty in that respect ought not to impair the vested right of the discoverer any more than the omission to record a colonization grant should effect the title of a *bona fide* grantee of land. The duty of recording registries in a book to be kept for the purpose was also imposed by ordinances prior to the time of Gamboa; but that author, though he strongly urges its policy and convenience, nowhere intimates that a failure by the mining tribunals to comply with this requirement of the law affected the title of the mine-owner—whose rights were evidenced by the copy of the "diligencias" or proceedings which was delivered to him—which corresponded to the "attested copy of the proceedings" which, by the Ordinances of 1783, was required "to be delivered to the party as his corresponding title."

If these views be correct, it follows that all the provisions of the ordinances indispensably necessary to vest the title in the discoverer of a mine have in this instance been followed. And Castillero, by his denouncement, the digging of a pit within ninety days, and the judicial possession given, acquired by law a right to his mine, with a number of pertenencias allowed to a discoverer working in company.

But it appears, from the loose and informal document executed by the Alcalde, that in addition to the juridical possession

which he was empowered to give, that officer "concluded to grant to Castillero three thousand varas in all directions, subject to that which the General Mining Ordinance indicates."

It will be observed, that the Alcalde does not here pretend to adjudicate the mine to the discoverer, nor to put him in possession of any designated number of pertenencias, but to grant him a large tract of land about his mine. It is unnecessary to say that such a concession, even of public land by an Alcalde was wholly void, and as against either the Sovereign or a private owner, conveyed no rights whatever.

It is insisted by the counsel of the United States, that this distinction between the possession of the mine and the *gracia*, or gift, of three thousand varas, is due entirely to the ingenuity of counsel for claimants, and is not found in the words or sense of the instrument.

We have already seen that the same distinction is clearly taken in James Alexander Forbes' letter of May 5th, 1847. We will hereafter see that it is alluded to in Castillero's communication to the Junta, in which he states "that he has taken possession not only of said mine, but also of an extent of three thousand varas in all directions from that point."

The distinction is not, therefore, a recent suggestion of ingenious counsel.

That it is very clearly expressed in the very inartificial document called the Act of Possession, is not pretended.

Taken literally, that document merely states that, "I, the Alcalde, have resolved to act, by virtue of my office, in order to give juridical possession of a mine known by the name of Santa Clara, and (after sundry recitals) have concluded to grant him three thousand varas in all directions, subject to what the Mining Ordinance indicates."

Nor is it pretended that any possession of the mine as distinguished from the three thousand varas, was given. That the Alcalde, the assisting witnesses and others, went to the mine for the purpose of giving a possession of some kind, is clear: but he made no measurements, and fixed no stakes. He probably told Castillero that he gave him possession of the mine

and added that he might take three thousand varas in every direction around it.

The explanations of this act given by Pico himself, are confused and contradictory.

In his first deposition, taken on behalf of the claimants, Pico says: "Castillero told me he required three thousand varas in all directions, and I told him to take them. He told me he had that right by reason of his being the first discoverer of the metal. According to what Castillero told me, I believed that I, as Alcalde, had authority to do that, there being no other *Juez de Letras*. He was a man learned in all those subjects." He adds: "I do not know whether it [the land of which he gave possession] was round or square, because I made the division in different directions, as I proposed to Castillero; that is to say, that he should take it where it was vacant, or in the mountains, because the rancheros would not have mountains—they wanted plains only."

In a subsequent deposition, taken some three years afterwards —viz., in 1860—Pico admits that he had stated in a deposition taken in another case, that he pointed out the boundaries which Castillero was to take, but gave him no fixed possession; that there was a question between Castillero and Berreyesa—Berreyesa would not consent that possession should be given to Castillero unless he would admit that he (Barreyesa) should have an interest in the mine. In consequence of this, I did not give any fixed possession of the land.

In a subsequent part of the deposition of 1860, (Ans. 17,) Pico says: "I intended to grant only what was intended by the ordinance around the mine, and the rest to be taken on public land." "I never intended to grant another man's land." (Ans. 16.) When reminded by the counsel for the United States that the mine was at some distance from the nearest body of public land, recognized as such at that time by himself, and asked how he could have granted three thousand varas, to be measured in all directions from the mouth of the mine, if he intended only to grant public land, the witness replies: "It was because Berreyesa agreed with Castillero at the time, and told me I might

grant the land, provided I did not include the land needed for cultivation; and, therefore, I made the grant." And in Answer 24, he admits that three thousand varas in all directions would include part of Berreyesa's land as well as public land.

Amidst these confused and contradictory statements it is, I think, not difficult to perceive what was really done, or attempted to be done, by the Alcalde. He was aware, and so informed Berreyesa, as he states, that "the ordinances authorized a certain quantity of land around the mine to be granted, whether on public or private land—that is, that to the discoverer and to the one working in company, a certain number of pertenencias were to be assigned. How many, neither he nor probably Castillero knew. But in addition to these pertenencias, which determined the extent of the mine, he also undertook to grant a tract of three thousand varas to be taken on public, or on Berreyesa's land, if the latter consented. The transaction with regard to this grant seems to justify the observation of James Alexander Forbes, in his letter of October 30th, 1849, that the possession of the mine granted by the Alcalde to Castillero "was precarious and illegal; the latter being in reality the judge of the quantity of land given by the Alcalde."

The concession of the three thousand varas is by its terms provisional, for it is declared to be "subject to what the general Mining Ordinance indicates;" nor does it purport to be a concession of the tract described, as of so many pertenencias of the mine, but rather a grant of land as a gracia or gift.

The difference is important, for in the one case Castillero (if the grant were valid) would, under the Mexican laws, have been the owner, not only of the large tract conceded to him, but of all the mines which might be discovered within it; in the other, he would merely have owned the mineral veins within the pertenencias allowed by law, while all others within the three thousand vara tract would have remained liable to denouncement by any one who might discover and be ready to work them.

Castillero himself seems to have understood that he was entitled to four pertenencias, for in the petition of Castro, which was drafted by himself, there is asked "three pertenencias in con-

tinuation of the first." It is not, however, very clear that three additional pertenencias are here asked for, or perhaps Castro may have misunderstood Castillero's instructions, for it appears that in his ratification of McNamara's contract, made at Mexico, December 17, 1846, Castillero describes the mine as of three pertenencias only. That such was understood to be the dimensions of the mine by all parties, in 1846 and 1847, appears not only from their acts of sale, but from the testimony of James Alexander Forbes.

This witness states, that "in 1846 he received from Padre Real possession of the mine, the hacienda, about a mile distant from it, the mining utensils and some ores. No definite extent of land was specified. It was understood that the mine contained three pertenencias at that time, but the hacienda was not understood to be within the three pertenencias." The possession transferred by him to Walkinshaw in 1847, and again on his return from Tepic received back from Walkinshaw, is stated to have been like the original possession received from Padre Real. It comprised the hacienda and the mine, but no definite tract of land.

In a subsequent part of his examination he says: "There was only one act of possession which I understood to have been given. This embraced three pertenencias, so far as regarded the mine. Three pertenencias, and also lands about the hacienda, I understood to have been given to Castillero in 1845."

"These lands were understood to be of the extent of three thousand varas," he adds; and in the deed received by him from the Robles, and which conveys "all their rights and shares in each one of the *three pertenencias* of the mine," their interest in the lands and hacienda passed; for, "by Mexican custom, a sale of barras in a mine includes an interest in the hacienda."

In the possession obtained by Alexander Forbes from Weekes, Alcalde, in January, 1848, four pertenencias seem to have been considered the number to which the parties were entitled, and a tract two hundred varas long and eight hundred wide, compris ng exactly four pertenencias, is designated by the Alcalde.

It is, I think, apparent, that from 1846 down to a late period

the parties interested considered themselves the owners of a mine, with the number of pertenencias allowed by law—whether three or four, they seem to have been uncertain—and that this ownership, acquired by registration and denouncement, carried with it the ownership of the hacienda or reducing establishment But they seem to have attached, so far as we can discover from their acts of sale, proceedings at law, &c., little importance to the rights in the large tract six thousand varas square, which the Alcalde assumed to grant them partly on public and partly on private land. On no other hypothesis can we account for the omission to mention the word "lands" in any of their conveyances during so long a period.

No inference of fraud can, however, be justly drawn from this circumstance, for the same omission is observable in deeds and proceedings *after* the date of the supposed forgery as before it.

But whatever may have been the notions of the parties as to their rights, it is, I think, plain that the possession given to Castillero should legally be treated as having included two entirely distinct objects: one, the *mine* properly so called, comprising the pit or "pozo de posecion," with the limited number of pertenencias allowed by the ordinances; and the other, a tract of land six thousand varas square, which the Alcalde assumed to grant, but of which no "*fixed possession was given.*"

This distinction between the judicial possession of the mine, which the tribunal having jurisdiction of mining matters had a right to give, and a grant of more than a square league of *land*, partly on private and partly on public, is not only admitted but insisted on by the counsel for the claimant. Its importance will appear hereafter when we come to consider the alleged "*ratification*" of the mining possession by the Supreme Government.

By art. 14, tit. VI., of the Ordinances of 1783, it is provided, that "Any one may discover and denounce a vein or mine, not only in common land, but also in the private lands of any individual; provided he pays for the land of which he occupies the surface, and the damage which immediately ensues therefrom, according to the valuation of experts appointed by both parties, and a third in case of disagreement. The same being understood

with respect to him who denounces a place (sitio) or waters for establishing works, and working the machines necessary for the reduction of ores, which are called haciendas; provided they do not include more land, nor use more water than may be necessary."

It is not pretended that in this case any denouncement of a sitio or of waters for a hacienda, was made. Had such been the case, and the title to a hacienda duly acquired by the mine-owners, it may well be that, as affirmed by Mr. Forbes, a sale of a barra, or share, in the mine would have conveyed, by Mexican usages, a corresponding interest in the hacienda. But the parties appear to have selected and taken possession of this hacienda relying on the grant of six thousand varas square, made by the Alcalde, or on some arrangement made with Berreyesa, the reputed owner of the land.

Antonio Maria Pico, in his last deposition, seems to desire it to be understood that Berreyesa gave an oral assent to the grant provided it did not include the level land; and in a previous deposition before the Land Commissioners, the same witness testified that a written contract was entered into between Berreyesa and the owners of the mine, by which the former was to have a share in the mine, and was to be paid for the wood and limestone used in the establishment. After the possession was given, Berreyesa demanded a compliance with the contract, and wrote to Padre Real to that effect. It does not appear that any arrangement was entered into with him. He was soon after killed by the Americans, and the hacienda and tract of three thousand varas in every direction has remained in the possession of the New Almaden Company to this day.

I am unable to perceive how, under these circumstances, and in the absence of any denouncement of the sitio used for a hacienda, Castillero can be deemed to have acquired, by the attempted concession of the Alcalde, any title whatever to lands beyond the limits of the pertenencias which the law allowed.

With respect to these, the Ordinance does not expressly declare whether the denouncer of a vein or mine on private land is required to pay for the land of which he occupies the surface as

a condition precedent to the vesting of his title. It would seem that he is not.

The denouncement or formal declaration of discovery is evidently the first step to be taken; the pit is then to be dug and the discoverer is, by the terms of Art. iv., to be put at once into possession. No provision is here made for a suspension of proceedings until the land can be valued and paid for, nor until the expiration of ninety days can the denouncee be sure that some one having a better right will not present himself; as the private land owner is only to be paid for the surface land which is occupied, and the ensuing damage, it would seem impossible to ascertain what amount of surface land is to be occupied until the number of pertenencias is fixed and their boundaries marked out, which can only be done when judicial possession is given.

The ordinance seems to contemplate a claim or proceeding instituted by the land owner; for it provides that the land shall be appraised by experts appointed by both parties. If, therefore, the payment for the land, and satisfaction for damages, are conditions precedent to the vesting of any title to the mine, the land owner might, by refusing to appoint an expert, indefinitely postpone its acquisition—thus defeating the policy of the Mining Laws, as well as the right of the discoverer, which those laws so fully recognized, and so amply protected. For it is not to be forgotten, that under the Spanish as well as all other Mining Ordinances, the discoverer was considered the true owner and creator of the wealth he had discovered, and that the grantee of the superficies had merely the right to an idemnity for actual damage done by the occupation of a small portion of the surface. But to hold, under the circumstances of this case, that no title vested by denouncement and discovery, because the claim of Berreyesa was not first satisfied, would be peculiarly inequitable.

The mine, it is true, was generally understood to be on his land, and denounced as such. But no judicial measurement of his land had been made, nor were his boundaries established. It is to this day unsettled, whether in fact the mine is within the boundaries of Berreyesa, or those of his neighbor, Justo Larios.

or without both, on public land. Had Berreyesa been paid, as required by the ordinances, it may yet prove that the payment was unnecessary, because the mine was on public land; or to the wrong person, because it is on the land of Justo Larios. Where land was gratuitously distributed in tracts from one to eleven square leagues in extent, the indemnity which experts would have awarded for the occupation of a few rectangles of the surface, two hundred varas long by two hundred wide, would have been little more than a nominal sum; and to defeat the meritorious title of a discoverer, because under such circumstances the indemnity was not paid, would seem unjust and absurd.

The next question to be considered on this branch of the case is, whether the Alcalde had, under Mexican laws, jurisdiction to receive denouncements, make registrations, and adjudicate the titles of mines.

By art. iv., tit. vi., of the Ordinances of 1783, the discoverer was required to present himself before the Deputation of that Territory (territorio), or the one nearest if there should be none there.

It is unnecessary particularly to examine the nature and organization of the Special Tribunals to which the ordinance refers. It is sufficient to say that they were composed of deputies chosen by the enrolled miners of each mining territory, who themselves were members of the great mining corporation or body of matriculated miners throughout the Kingdom of New Spain.

These Special Tribunals were in the Federal territory abolished by the Constution of 1826 and by the law of 1837.

But by the law of December 2d, 1842, Courts of First Instance, composed of three Territorial Deputies elected in the manner prescribed in the ordinance, were required to be established in each of the Departments by the Governor, in concert with the Departmental Junta, and with the previous approval of the Supreme Government.

To these Courts were given substantially the powers formerly possessed by the Territorial Deputations under the ordinances.

Under this law mining tribunals were established in various Departments, but none were ever organized in the Californias.

It is contended, that inasmuch as these tribunals existed in some parts of Mexico, it was the duty of the discoverer to address himself to the one nearest to his mine; and that that tribunal alone had jurisdiction in the premises.

It is not disputed, as a general principle of Mexican law, that in default of any of the authorized special tribunals, their functions devolve upon the Courts of general jurisdiction. The question then is, was there any special tribunal to which the discoverer of a mine in the Department of the Californias could address himself.

It seems to be considered by the counsel for the United States, that the provision of the ordinance which directs the discoverer to the deputation of the nearest territorio, in default of any deputation within his own territorio, of necessity directs him to the nearest Departmental Court organized under the law of 1842, if there be none in his own Department. But this provision of the ordinance is not adopted or alluded to in the law of 1842, The small territorios, in each of which a Mining Deputation was by the Ordinances of 1783 to be established, in no respect corresponded to the great divisions of the Mexican Republic called "Departments," in a single one of which both the Californias were included. The Deputies under the ordinances were to be elected in each Real or Asiento of mines by the matriculated miners "*of that place*" (*lugar*), whose names were embraced in a book kept by the Judge and Notary of that mining place (Mineria).

I am not informed what were the ordinary territorial limits of the Reales or Asientos of mines here spoken of; but it is obvious that they could not have been larger than would be consistent with the convenience of the miners who were required to enroll their names, and every year to vote at elections. When, therefore, it happened that in a newly discovered mining district, no deputation had been elected, the discoverer was reasonably directed to the nearest deputation, which would ordinarily be at no great distance.

But to send him to a remote Department of Mexico on such an errand would be absurd, and a practical denial to him of any

right whatever to register his mine. Nor could in such case the other provisions of the ordinances be complied with; for to what purpose affix notices on the doors of the churches in Chihuahua, that an individual had discovered or denounced a mine in Upper California, and how could one of the Deputies personally go, and within ninety days inspect the mine, examine the pit, and give the possession as enjoined by the ordinances?

That no such proceedings could have been contemplated by the law of 1842, is also clear from the terms of the law itself. The Governor and Junta of each Department were to establish, as we have seen, as many Courts of First Instance as were required within their limits.

It is to be presumed that the jurisdiction of each of these Courts was restricted to the territorial limits assigned to it; but it certainly did not extend beyond the boundaries of the Department. Art. XXVI., provides, that "Each one of these Courts shall exercise *within its territory* the executive and economical powers given by the old ordinance," &c, How, then, can it be supposed that, organized under the authority of the Department, and with its jurisdiction restricted to its territory, it could take cognizance of mining matters in another Department, separated from it by hundreds of leagues, and with which communications were rare and difficult.

It is, I think, beyond doubt, that at the time of the discovery of this mine, there were not only no special tribunals in California which had jurisdiction in mining matters, but there were none anywhere established in Mexico which possessed jurisdiction to make a registration of a mine discovered in California. On the principle of Mexican law already referred, the functions of the special tribunals, under these circumstances, devolved on the Courts of ordinary jurisdiction—or rather the jurisdiction remained in them, as it had done in the Federal Territory from the adoption of the Constitution of 1824 and the law of 1837; it never having been divested in this Department by the establishment of special tribunals under the law of 1842.

If, then, the ordinary Courts had cognizance of mining matters

in the Californias, the jurisdiction must have been vested in the Alcaldes, for no ordinary Courts of First Instance existed.

By the decree of May 23, 1839, the judiciary of each of the Departments was to be composed of Justices of the Peace, Alcaldes, Judges of First Instance, and a Superior Tribunal.

But this organization was not perfected in the Californias, and the Alcaldes in this Department appear to have exercised the functions and jurisdiction which would otherwise have belonged to the Courts of First Instance.

In the decree of March 2, 1843, it is stated, that in the Californias there had been no Courts of Second and Third Instance established in the Californias, New Mexico, and Tabasco; and by Act 28th, the Governors of those Departments are ordered "to take care that justice is punctually and completely administered in First Instances by Judges of that grade, if there be such, or by Alcaldes, or Judges of the Peace." But even if the authority of an Alcalde to take cognizance of mining matters were doubtful, it ought, I think, to be sustained as that of a *de facto* officer exercising an undisputed jurisdiction.

The registration of a mine was a simple proceeding, of which the principal objects were to apprise the Government of its existence, so that it might secure its portion of the produce—to give an opportunity to other persons to show a better right than that of the alleged discoverer or denouncer, and to subject the latter to the salutary rules of the ordinance as to its working and preservation. When the discoverer had made known his discovery in the manner prescribed by law, and dug his pit of possession, the law itself gave him the title.

It would seem, therefore, that if the discoverer addressed himself to the only judicial authority of the country, and if that authority, with the knowledge and acquiescence of the Governor and inhabitants of the Department, took cognizance of the matter and adjudicated the mine to him, a presumption in favor of the rightful exercise of power ought to be indulged. Nor should we affirm the Alcalde's acts to be void, except on the clearest proofs that he was wholly without jurisdiction in the premises.

Having thus seen that by the discovery and registration of his

mine, and by the possession given by the Alcalde, Castillero acquired a right to the mine, with the number of pertenencias allowed by law, I proceed to inquire what number of pertenencias he thus became entitled to.

By art. 1, tit. vi., of the ordinances, it is provided that "the discoverers of one or more mineral hills, (*cerros,*) absolutely new, in which there is no mine nor trial pit open, may acquire in the principal vein which they select, as many as three pertenencias, continuous or interrupted, according to the measurements which are hereinafter prescribed; and if they have discovered more veins, they may have one pertenencia in each vein, said pertenencias being discovered and marked out within the term of ten days."

Art. 2, tit. xi., provides: "Although by these ordinances I prohibit any individual miner who works in the ordinary limits from denouncing two contiguous veins on the same vein—not withstanding this, I grant to those who work in company, although they be not discoverers, and without prejudice to the right which by reason thereof they may have in case they are such, (y sin perjuicio del derecho que por este titulo deban tener en caso de que lo sean,) the right to denounce four new pertenencias or mines which have been worked and abandoned, even when they are contiguous and on the same course."

It is claimed that, under these provisions, Castillero was entitled as a discoverer to three pertenencias, and as one working in company, to four additional pertenencias, making seven in all.

The counsel for the United States contends that the allowances of pertenencias mentioned in the foregoing articles, are not cumu-.ative; and that four, or the number given to him who works in company, are all that can be acquired.

The determination of this question entirely depends upon the true meaning of the Spanish text. The counsel for the United States insists that the Spanish phrase quoted above reads when properly translated: "And without prejudice to the right which by this title [viz., that of discoverers] they may be entitled to have in case that they may be such."

That is, that although it was prohibited to an individual miner to denounce two contiguous mines, yet those who work in company may denounce four pertenencias, either new and unopened, or old and abandoned mines; and this right is not to prejudice their rights as discoverers, in case at any time thereafter they may *become* such.

If, however, we attribute a present and not a future signification to the verb, the meaning of the phrase would be, that all persons working in company shall have four pertenencias, and shall enjoy this right without prejudice to their rights as discoverers, in case *they are such*; that is, all persons working in company shall have four pertenencias, and if they be also discoverers, their rights as such shall remain to them.

I do not pretend to be able to determine, from a knowledge of the Spanish, which is the true translation of the phrase. I have therefore addressed myself for information to several persons skilled in that language. They all concur in adopting the translation suggested by the claimants.

There are some general considerations which serve to strengthen my belief in its correctness.

The object of the law was to determine the extent of mining spaces, or pertenencias, to be allowed to miners. As the merit of the discoverer was greater than that of one who merely denounced a forfeited mine, and as the policy of the law was to encourage and reward discoveries, it gave to the discoverer, though working alone, three pertenencias, if his discovery were of an absolutely new hill, in which no mine had been opened; but if the discovery were of a new vein in a hill known and worked in other parts, he was allowed to acquire two pertenencias. It was also the policy of the law to promote the development of mines by encouraging the formation of companies, the associated capital of which would enable them to prosecute the works on a larger scale and with greater efficiency. Title ix., in the 1st article, enjoins upon the Viceroy to encourage, promote, and protect all such partnerships by all convenient measures.

In furtherance of the same policy, article 2d gives to all those

who work in company the right to acquire either four new and unopened pertenencias, or four mines (of one pertenencia each) which have been worked and abandoned. The law which prohibited the acquisition of two contiguous pertenencias by an ordinary miner, is *pro tanto* repealed, while those which determined the rights of discoverers are allowed to remain.

Such would seem the natural mode of carrying out the evident policy of the law-giver.

For why should the ordinary miner be rewarded with three additional pertenencias, because he works in company, and the discoverer only be allowed one additional pertenencia?

The law recognizes the two species of merit—that of discovery, and that of working in company. If a miner possesses both, ought he not to receive the rewards allowed for both?

The phrase, "and without prejudice to their rights as discoverers," &c., is evidently intended to guard against interpretation of the provision prejudicial to the rights of the discoverers. It is the exclusion of a possible conclusion which might otherwise have been drawn.

But could it have been supposed that because persons working in company are to have four pertenencias, no one of them could have the rights of a discoverer, if at any future time, and perhaps at a distance from his mine, he discovered an entirely new hill? Such a construction of the provisions in favor of partnerships would have been wholly unwarranted. This could not, therefore, have been the conclusion intended to be excluded. But it might have been supposed that the law, in giving to partnerships four pertenencias, meant to fix the maximum number of contiguous mines which the same individuals could in any case acquire. If, as discoverers, they were already entitled to three the formation of the partnership would give them but one more. Both provisions would thus have been satisfied. Three of the pertenencias would be held by a double title—that of discovery, and that of working in partnership—while the fourth would be given for the latter reason alone.

To guard against this construction, the provision was inserted that the allowance to partners should be without prejudice to

their rights as discoverers, in case they were such; and in this view the provision was sensible, and perhaps necessary. It left to each kind of merit its appropriate reward, and gave to the miner who united both in himself, all the privileges which the law attached to each.

I am, therefore, of opinion, that under the Mining Ordinances referred, Castillero, as a discoverer, and as one working in company, was entitled to seven pertenencias.

Having thus ascertained what acts were done and rights acquired by Castillero in California, we will next consider the title claimed to have been obtained by him from the Supreme Government of Mexico.

The facts as alleged by the claimants, are as follows:

Early in 1846, and while he was yet in California, Castillero, impressed with the importance of the brilliant discovery he had made, communicated the fact in two letters addressed to J. J. De Herrera, former President of Mexico, dated at the Mission of Santa Clara on the 19th and 22d February, 1846, respectively, and also in another letter written on the last mentioned day to Don Tomas Ramon del Moral, at Mexico.

These letters, together with some specimens of cinnabar and a small flask of quicksilver, were sent by the hands of Lazaro Piña, who sailed from Monterey for Mazatlan in the brig Hannah, in the early part of March, 1846.

Extracts from the two letters to Herrera were, it appears, furnished by him to Señor Moral, and a note embodying these extracts, together with a copy of Castillero's letter to himself, were, by Señor Moral, about the middle of April, 1846, communicated to the Junta de Fomento y Administrativa de Mineria, a body chargeo with the development and encouragement of mining interests in Mexico, and the administration of certain funds connected with the same object.

There were also transmitted by Moral to the Junta, at the same time, some specimens of cinnabar which had been delivered to him by Piña.

On the 21st April, 1846, the Junta addressed a letter to José Maria Tornel, Director of the College of Mining, transmitting to

him copies of Castillero's letters and the specimens of cinnabar, and requesting that an assay might be made of the latter.

On the 23d April, Tornel, by an order on the margin of the letter of the Junta, directed the specimens to be sent to the Junta Facultativa, or Faculty of the College, for assay.

The result of the assay was communicated to Tornel by Señor Moral, President of the Junta Facultativa, on the 24th April, 1846, and the receipt of this letter was acknowledged on the 29th of the same month by Tornel, who, on the same day transmitted the letter of Moral of the 24th, announcing the result of the assay, to the Junta de Fomento. His official communication on the subject was received by them on the 3d May, and on the 4th, ordered by an "acuerdo" or marginal order to be sent to the Government. On the succeeding day, viz., the 5th, a communication signed by Vicente Segura, President of the Junta, and Isidro R. Gondra, First Clerk, was accordingly addressed to the Minister of Justice, in which was stated the reception of the specimens, and their transmission to the Director of the College for assay. A copy of the communication of the Director of the College, stating the result of the assay, was also embodied in the Junta's letter, and the Minister of Justice was informed that the Junta had already asked Castillero what kind of aid or protection he needed for the encouragement of his brilliant enterprise, &c., &c.

This letter was received by the Minister of Justice on the 9th May, as shown by the marginal note of its contents and reception, and on the same day the Minister formally acknowledged its receipt in a dispatch addressed to the Junta.

On the 12th May, 1846, Castillero, who had sailed from California in the barque Don Quixote, and arrived in Mexico, submitted to the Junta nine propositions in writing, in which he indicated the kind of aid and protection he required. He had previously, however, appeared before them, given a verbal account of his discovery, and been requested by the Junta to furnish a written statement as to what aid he required.

On the 14th May, 1846, the Junta transmitted the written statement of Castillero to the Minister of Justice, retaining a

copy in their own office. In this communication of the Junta, the Government is urged to accept the propositions of Castillero.

Among the propositions thus made by Castillero to the Junta, and by the latter transmitted to the Minister of Justice, were the following:

"7th. The Junta shall represent to the Supreme Government the necessity of approving the possession which has been given me of the mine, by the local authorities, in the same terms as those which I now hold it."

"8th. It shall also represent the advantage of there being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my burnings."

The communication of the Junta, inclosing the propositions of Castillero, and urging their acceptance, was received by the Minister of Justice, and on the 20th May, the following "acuerdo" was noted on the margin:

"Granted in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations for the proper measures of his office, with the understanding that the Supreme Government accedes to the petition."

This "acuerdo" is signed with the rubric of Becerra, Minister of Justice.

On the same day (May 20th) Becerra addressed to the President of the Junta an official dispatch, as follows:

"*Ministry of Justice and Public Instruction.*

"MOST EXCELLENT SIR:—Having reported to His Excellency, the President *ad interim* of the Republic, your Excellency's communication of the 14th inst., with which you were pleased to transmit with a recommendation the petition of Señor Don Andres Castillero, for the encouragement of a quicksilver mine which he has discovered in the Mission of Santa Clara, in Upper California, His Excellency has been pleased to approve in all its parts the agreement made with that individual in order to commence the working of said mine, and on this day the corresponding communication is made to the Minister of Exterior Relations and Government, to issue the proper orders with respect to that

which is contained in the 8th proposition for the grant of lands in that Department.

"I repeat to your Excellency the assurance of my esteem.

God and Liberty. Mexico, 20th May, 1846.

"BECERRA.

"To His Excellency, D. Vicente Segura,
President of the Junta de Fomento de Mineria."

On the same day Becerra addressed to the Minister of Relations an official communication, in which he transcribes the foregoing dispatch to Segura, and adds:

"And I have the honor to transcribe to your Excellency, to the end that with respect to the petition of Señor Castillero to which his Excellency the President *ad interim* has thought proper to accede, that there be granted to him as a colonist two square leagues upon the land of his mining possession, your Excellency will be pleased to issue the orders corresponding."

In obedience to these orders, the Minister of Exterior Relations, Castillo Lanzas, on the 23d of May, 1846, directed an official dispatch to Pio Pico, Governor of California, in which, after transcribing the foregoing communication of Becerra, he says:

"Wherefore I transcribe it to your Excellency, in order that in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Señor Castillero in possession of the two square leagues which are mentioned.

"God and Liberty, Mexico, May 23d, 1846.

"CASTILLO LANZAS.

"To His Excellency the Governor of the Department of the Californias."

Upon these last dispatches, viz., that from Becerra to the Junta de Fomento, of May 20th, and that from Castillo Lanzas to the Governor of California, of May 23d, the claimants rely, as constituting a ratification of the grant by the Alcalde of three thousand varas in every direction, and a concession of two square leagues of land. They also claim that the "acuerdo" or marginal order found in the communication of the Junta of May 14th

1846, amounts, in equity at least, to a concession of all that the Junta recommended.

The proofs of the foregoing allegations consist of a large number of espedientes from various public offices in Mexico—of certified copies of the actas or minutes of the proceedings of the two Juntas, viz., the Junta de Fomento and the Junta Facultativa, of the College of Mining—of certified transcripts of entries in official books of the Ministers, and of the parol testimony of Members of the Juntas, Clerks in the offices by whom the documents were written, and of the Minister himself, Castillo Lanzas, who was the author of the dispatch of May 23d. These witnesses swear, not only to the existence of the archives, the handwriting and the genuineness of the various documents, traced copies of which are produced, and to the accuracy of those copies, but also to the facts stated to have occurred, or to such parts of the transactions as each was personally concerned in.

Some of these witnesses, who were brought from Mexico by the claimants at great expense, have held distinguished official positions, are of advanced years, and independent fortunes.

The United States aver that their testimony is false and perjured, and that the documents sworn to by them are forged and ante-dated. To arrive at a just estimate of the force of the evidence and reasons on which the United States rely to support this accusation, a brief statement of the nature and amount of the proofs offered by the claimant is necessary.

In the short summary of the evidence which I propose to give, I shall follow rather the chronological sequence of the events alleged to have occurred, than the order in which the various documents were produced.

It will be remembered that the Junta de Fomento was first notified of the discovery of a mine of quicksilver by Castillero, by receiving from Don Tomas Ramon del Moral a communication, containing copies of letters from Castillero, that this communication was sent to the Director of the College that an assay might be made, and by him referred to the President of the Faculty, who in due time reported the result of the assay to the

President, who in turn communicated it to the Junta, and the latter to the Minister of Justice.

There is accordingly produced from the Archives of the College of Mining the original communication of the Junta de Fomento, signed by the President, Vicente Segura, and addressed to the Director of the College, together with copies of the communication of Moral, which, with the specimens of cinnabar, were sent to the Director. The accuracy of the traced copy produced, and the existence of the original in the College of Mining, is testified to by José Maria de Bassoco, for many years a member of the Junta, and by Balcarcel and Castillo, Professors in the College. These witnesses also swear to the handwriting of the dispatch, and of the copies of the letters, to the genuineness of the signatures of Vicente Segura, President of the Junta, and of Gondra, the Chief Clerk of the Junta, who certifies to the copies which accompany the dispatch. On the margin of the dispatch is an acuerdo, or order signed "Tornel," directing it to be sent to the Junta Facultativa. The fact that Tornel was Director of the College, and the genuineness of his signature, are also proved by the same witnesses.

From the archives of the Junta Facultativa of the College, are produced traced copies of the minutes of a session of the Board on the 24th April, 1846, (erroneously dated 24th March). These minutes show a resolution of the Board, that a report of what had been done, and the result of the assay made by Professor Herrera, be communicated to the Director of the College. From the same archives is produced a traced copy of the reply of the Director General Tornel to the report of the Board, in which he acknowledges the receipt of a letter from Moral, President of the Faculty, of the 24th April, communicating the result of the assay. The accuracy of these traced copies, and the existence, genuineness and handwriting of the originals, are proved by the Professors Castillo and Balcarcel, who were present at the meeting of the Faculty, and who not only swear to their personal recollection of the facts, but also testify that the cinnabar was received, an assay made, a meeting of the Faculty on the subject held, and the specimens deposited with appro-

priate labels in the Cabinet of the College, where they now remain.

From the archives of the Junta de Mineria are produced traced copies of the office copy of the communication sent to the Director of the College, the original of which is found, as we have seen, in the archives of the latter; also a traced copy of the communication received from the Director of the College, announcing the result of the assay—with a marginal note directing it to be transmitted to the Government, signed by Segura, President of the Junta de Fomento.

There is also produced from the same archives, a traced copy of the borrador or office copy of the communication thereupon addressed by the Junta to the Minister of Justice together with a traced copy of his reply, dated May 9th, 1846.

There is also produced from the same archives a traced copy of the borrador or draft of a second communication from the Junta to the same Minister, transmitting to him the petition of Castillero, for aid, &c., and recommending it to the favorable consideration of the Government.

A traced copy of the reply to this communication by the Minister of Justice, is also produced from the same archives.

Appended to the espediente containing it, are certificates of Manuel Couto, Secretary of the Administration of the Mining Fund, and in charge of the archives of the office of Mineria.

A certificate of Vicente Segura, certifying to the official character and handwriting of Couto.

A certificate of P. Almazan, Chief Clerk of the Ministry of Encouragement, Colonization, &c., certifying to the official character of Segura, Administrator of the Mining Fund, and to that of Couto, the Secretary, and that the archives of the office are in charge of the latter, and also to their signatures and seals.

A certificate of J. Miguel Arroyo, Chief Clerk of the Ministry of Exterior Relations, certifying to the official character of Almazon, and to his signature and the seal of his office.

And, finally, a certificate of John Black, U. S. Consul, certifying to the official character and signature of Arroyo, and also that he is the person authorized by law to legalize Mexican doc-

uments to be used in foreign countries, and that the seal of the Department affixed to the documents is the same used in the legalization of all documents by that officer.

The accuracy of the traced copies, the existence and handwriting of the originals, where those originals are borradors or drafts, and the existence and handwriting of the signatures to the originals, where they are the original communications received by the Junta, are proved by Mr. Bassoco, by the Professors Balcarcel and Castillo, by Miranda and Yrisarri, who were employed in the Ministry of Justice, by Manuel Couto, who testifies that he copied Casullero's petition from his rough draft, and by Castillo Lanzas, the former Minister of Relations of Mexico.

From the archives of the Ministry of Relations, to which the archives of the Ministry of Justice have been transferred, are produced traced copies of the communication addressed by the Junta to the Minister of Justice, informing him of Castillero's discovery, and embodying the communication received by the Junta from the Directors of the College, informing the Junta of the results of the assay.

A traced copy of the draft of this communication, as we have seen, is produced from the archives of the office from which it emanated. A traced copy of the borrador or draft of the Minister's reply to this communication, is also produced from the same archives, in all respects conforming to the original reply, a traced copy of which, as before stated, is produced from the archives of the office to which it was directed.

There is also produced, from the same archives, a traced copy of the communication of the Junta, inclosing and recommending Castillero's petition, corresponding with the borrador produced from the archives of the Junta, and a traced copy of the borrador of the reply of the Minister, in like manner corresponding with the original produced from the archives of the Junta.

On the margin of the communication of the Junta is the usual membrete or memorandum of its contents, and an "acuerdo" or order of the Minister in regard to it. The latter is signed with the rubric of the Minister, and the official dispatch transmitted

to the [illegible] conforms entirely to the acuerdo or resolution taken on the subject, and noted in the margin of the communication. There is also produced from the same archives a certified copy of the draft of the communication addressed by the Minister of Justice to the Minister of Relations.

From the archives of the Ministry of Relations is produced a traced copy of this last communication of the Minister of Justice, the borrador of which is found in the office of the latter; and a borrador of the communication or dispatch addressed, in pursuance of the order of the Minister of Justice, by the Minister of Relations, Castillo Lanzas, to Pio Pico, Governor of California. And, finally, the claimants produce from their own custody, the original of the last mentioned dispatch, signed by Castillo Lanzas, and addressed to the Governor of California.

It may here be observed, that from the archives of the Ministry of Relations is also produced a traced copy of the communication of Pio Pico, of February 13, 1846, addressed to the Minister of Relations, informing him of Castillero's discovery, and transmitting Castillero's letter of December 10th, 1845. There is also produced from the same archives a traced copy of the borrador of the reply of the Minister, dated April 6th, 1846.

We have already seen that the borrodor of Pico's communication, and the original of the Minister's reply, are found among the archives of California in this city. Their genuineness is undisputed.

To the traced copies from the archives of the Ministry of Justice are affixed the certificate of Arroyo and seal of his Department, as also the certificate of Black, the United States Consul, in the same terms as those already mentioned.

The accuracy of the copies, the existence of the originals in the archives of the offices to which they belong, their handwriting and the genuineness of the signatures they bear, are sworn to by the escribientes, or clerks, by whom they were copied, some of whom are still connected with the Ministries, by M. de Bassoco, and by the ex-Minister Castillo Lanzas himself.

There is also produced a traced copy of an extract from a book now existing among the records of the Ministry of Justice

It contains various entries or notes, purporting to have been made from May 11th, 1846, to May 20th, 1846. Amongst those made on the 20th, is an entry of the membrete or memorandum of contents of the Junta's letter to the Minister, of May 14th, and of the acuerdo or resolution taken by the Minister on the subject. On the top of the first page on which the communication of the Junta is written, are found these letters and figures "L. g^{l} 15, S. f. 140 v^{ta}."

José M. Yrisarri, the Fifth *Oficial* of the Ministry of Justice, being interrogated as to the meaning of this inscription, testifies that it means "Libro General, vol. 15; reverse of page 140," and that the entry already mentioned is found in the volume and page referred to. He further states that this inscription, or reference, was made by himself, as was also the entry on the book to which it refers.

The original dispatch of Becerra to the Minister of Relations, is stated by Miranda and Yrisarri, to be in the handwriting of the former. The "acuerdo" on the margin is said by Castillo Lanzas to be in his own handwriting and signed with his genuine rubric; and the draft of the dispatch addressed by him to Pio Pico, to be in the handwriting of Mr. Quintanar, an employé of the Ministry of Relations in 1846. The original dispatch addressed to Pio Pico is proved to be in the handwriting of A. J. de Velasco, by Castillo Lanzas, and by Velasco himself. The signature of Castillo Lanzas is proved by Lafrague, former Minister of Relations in Mexico, by Velasco, who wrote the dispatch, and by Castillo Lanzas himself.

It is also testified by Mr. Negrete, that this identical dispatch was handed to him in December, 1846, by Castillero; that a copy of it was inserted in the instrument by which Castillero ratified the McNamara contract, and the original sent by him (Negrete) to Alexander Forbes, of Tepic, on the 19th of December, 1846.

In corroboration of this statement of Mr. Negrete, there is produced a series of letters written by him to Alexander Forbes, from December 5th, 1846, to February 6, 1847. In these letters Mr. Negrete informs Mr. Forbes of the state of his then pending negotiation with Castillero; and in his letter of December 18th,

advises him that he transmits "the document showing the grant which the Supreme Government made in favor of Don Andres Castillero for two leagues of land," &c.

These letters, which Mr. Negrete swears he saw for the first time since they were written, when produced to him by the claimants in this country, he testifies are in his own handwriting and that of his clerk, Oruña, and signed by himself. He also identifies three checks or orders drawn by himself on his banker, Don Donato Manterola; one in favor of Castillero for $4,000, and receipted by the latter, and two in favor of Dor Nazario Fuentes, the Notary, for $137.25, and $29.75, respec tively, both of which are receipted by Fuentes.

The testimonio or authenticated copy of Castillero's instru ment of ratification, containing the Lanzas dispatch, is exhibited It is signed by Nazario Fuentes, the Notary Public, whose signature and *signo* are attested by three Notaries Public in a certificate under the seal of the National College of Notaries of Mexico, dated December 19, 1846.

A second copy of the same instrument, issued from the office of the Notary Fuentes, under his hand and seal, is also produced. It is dated February 6, 1847, and is certified by three Notaries Public, under the hand and seal of the National College of Notaries. Among the three Notaries signing these certificates is Villalon. This gentleman has been examined as a witness. He testified that his signature and *signo* on each of the certificates are genuine, that they were affixed at their respective dates; that the signatures of the other Notaries are genuine, as is also the seal of the National College. It is also shown that this instrument of the ratification was brought to California by Mr. Walkinshaw in 1847, when he took charge of the mine; and the terms of James Alexander Forbes' ratification, in which the language of Castillero's act is copied, show that the latter must have been before him when writing his own ratification of the McNamara contract—a conclusion rendered certain by the very distinct allusion in Forbes' letter of May 5, 1847, "to the possession of two sitios ordered to be given by the dispatch of Señor Castillo Lanzas."

The claimants have also produced from the Archives of the Junta de Fomento, traced copies of the original borradores, or drafts, of the minutes of the Junta in April, May, September, November and December, 1849; also a traced copy of the clean copy made from those minutes, and authenticated by the rubrics of the members of the Junta who assisted at the sessions; and finally, a copy of the entire volume 3d of the Minutes of the Junta from April 2, 1846, to June 30, 1847.

In these minutes, amongst a great number of other entries, we find a record of the action of the Junta from the reception of the specimens of cinnabar to the payment of the Notary Calapiz, when further proceedings were abandoned.

In the Actas of the session of April 23d, 1846, is an entry of the receipt of specimens of cinnabar from the Presidio of Santa Clara, in Calfornia, and a resolution that they be sent, with copies of Castillero's letters, to the Director for assay.

On the 4th of May, the receipt of the letter of the Director inserting the report of the Junta Faculatativa is noted, and it is resolved that it be transcribed to the Supreme Government, representing that a reply has been made to Señor Castillero, asking him what kind of protection or assistance he requires

On the 6th of May, the Actas show that Don Andres Castillero appeared and made a verbal report, &c., and the Junta resolved that Señor Castillero should present his indications in writing. On the 14th of May, the receipt of the communication from the Minister of Justice dated May 9th is noted.

On the 25th of May is a like note of the receipt of Becerra's dispatch of the 20th, approving the agreement made with Castillero, &c., and a resolution of the Junta that the proper judicial agreement be drawn up immediately, &c.

On the 29th of May, is a note of an order for the payment of $25 to the Notary Calapiz, for proceedings in the instrument of agreement which had been made with Castillero to assist his quicksilver enterprise, &c.

The accuracy of the traced copies of the Actas is testified to by Mr. Bassoco, who compared them with the originals; and he also proves the existence and authenticity of the originals in the

Archives of the Junta, and the genuineness of his own rubrics and those of his colleagues affixed to them.

The claimants have also produced, and filed as an exhibit, an original report made by the Junta de Fomento to the Minister of Justice relative to the matters confided to its care. This report is embodied in a report made to the National Congress by José M. Lafragua, Minister of Relations, and read before that body on the 14th, 15th, and 16th December, 1846.

The original manuscript "Memoria," or report by the Junta, is stated by Mr. Bassoco, to have been procured by himself from Escalante, the agent of Lafragua. Its proper place of custody was the Ministry of Relations, but M. de Bassoco supposes that it had probably been taken by Mr. Lafragua to his own house, when the latter was preparing his report to the National Congress, and accidentally remained among his papers. He identifies the signatures and rubrics of Vicente Segura and Isidoro R. Gondra, which are affixed to it, and states his conviction that it is the identical document sent in by the Junta to the Minister.

On referring to the "Actas" of the Junta, we find it noted on the 5th of November, 1846, that a dispatch was received from the Minister of Relations, dated November 3d, calling for an account of the labors of the Junta, to be furnished within eight days.

It also appears, that on the 9th the reading of the report was commenced; that it was concluded at the session of the 16th, and a resolution adopted, that the report should be transmitted to the Government; and that on the 5th of December, a communication from the Minister acknowledging its receipt was received by the Junta.

Two copies of the report of Lafragua, in which the Memoria was embodied, are also offered in evidence by the claimants. It is a printed volume of considerable size.

Of these copies, one was originally produced by the claimants and identified by Mr. Lafragua, Mr. Bassoco and others.

A second copy has recently been produced and identified by the Hon. J. P. Benjamin, one of the counsel in the cause, having been received by him in 1849, from Don José Garay, the

validity of whose grant he was then investigating. The volume remained in Mr. Benjamin's possession until about two years ago, when Mr. Rockwell, also of counsel for claimants called on him to retain him in this cause. In the course of conversation Mr. R. alluded to an official report of Mr. Lafragua, which, in his opinion, contained conclusive proof of the genuineness of the title of the claimant. From his description Mr. Benjamin thought he recognized the volume in his possession as the one referred to, and immediately procured it from an adjoining room. On examination it was found to contain the passages relating to the discovery of the mine, &c., which are found in the copy previously produced by the claimants. Mr. Benjamin was not, until that time, aware that it contained anything in reference to the mine. At Mr. Rockwell's request, he allowed him to retain the volume, which he recognizes as the one now produced.

The claimants have also offered in evidence files of the "Diario," the "Republicano," and the "Monitor Republicano," newspapers, in which the reading of Lafragua's report, on the 14th, 15th and 16th December, 1846, is noticed.

It is unnecessary to extract at length the passages in this report, in which reference is made to Castillero's discovery, and the action of the Government upon it.

They merely contain an account of the presentation of the specimens to the Junta by Señor Moral—the assay, the inquiry of Castillero as to the assistance he desired, his petition, and the Junta's agreement to it; the approval of the agreement by the Supreme Government, and the failure to carry it into effect, owing to the order of the Supreme Government, of May 10th, 1846, directing the suspension of all payments from the public Treasury.

In the foregoing statement of the documentary and other proofs on which the claimants rely to show the action, by the Mexican authorities, in reference to the important discovery of Castillero, much evidence as to various handwritings, signatures &c., has been omitted.

Enough has been set forth to show the nature and the force

of the proofs offered in support of the genuineness of the documents exhibited.

It will be seen that the proofs do not consist of any one set of papers derived from a single office, the archives of which might have been falsified and the officials corrupted.

Each document is found in two, and some in three, distinct repositories. The barradores are produced from the offices from which the communications emanated; the originals from the offices to which they were sent; and in some instances the communications are, according to the Mexican custom, inserted in dispatches from the office to which they were originally directed, and those dispatches are found in the archives of the Ministry to which they are addressed.

All the papers are so intimately connected and complicated with each other, that it is almost impossible to suppose any one to have been fabricated, unless the whole series be spurious. They are written in various handwritings, with a multitude of signatures, rubrics, etc., of well-known individuals attached to them. The same document contains, in some instances, no less than four different handwritings, viz., that of the clerk who drew it, of the official who signed it, of the clerk who wrote the membrete and acuerdo, and that of the Minister by whom the latter was signed.

The writing is sworn to be that of clerks attached for many years to the offices from which the papers emanated. Their handwriting must, therefore, be well known, and a forgery of it could readily be detected.

When we consider the long series of forgeries, and the almost innumerable perjuries, which must have been committed if these documents are not genuine, the crimes imputed to the witnesses are as appalling as the extent and almost endless ramifications of the conspiracy to commit them are incredible.

We must suppose that Professors in a National College, forsaking their scientific pursuits, have carefully fabricated false minutes of the proceedings of the faculty of which they were members; that they have made a tedious and dangerous journey to sustain, by carefully-prepared perjuries, the forgeries they

had committed; and that they have had ingenuity and lepravity enough to give to their statements the appearance of truth, by inventing circumstantial details as to the reception of the specimens, the assay made of them, their deposit in the cabinet of the College, and even the purport of the tickets or labels upon them, which, as they state, can be seen by any visitor to the College.

With regard to the Junta de Fomento, the forgeries and perjuries imputed are still more complicated and improbable. Not only must the various dispatches alleged to have been addressed by them to the Director of the College, and to the Minister of Justice, with the signatures of the President of the Junta, and of the Secretary, the handwriting of the Clerk who drew the marginal notes upon them, and the rubic of the Minister appended, have either been forged, or falsely sworn to have been written at their dates, but a series of *actas*, which record the proceedings and resolutions of the Junta, must have been fabricated, or extensively interpolated, and the rubrics of the members forged. And, as if reveling in supererogatory crimes, they must also have fabricated the borradores, or rough drafts, from which the clean copies of the minutes were made out—the existence of which would hardly have been suspected, and which it would naturally be supposed had been destroyed.

They must also have prepared a voluminous report to the Minister, in which has been inserted an account of these proceedings, precisely such as, if they had taken place, we should expect to find. The manuscript of this report, which is claimed to have been accidentally left among the private papers of the Minister to whom it was addressed, must have been forged, or the interpolated passages inserted in it, in a manner to defy detection. And they must also, at least as early as 1848, or in the beginning of 1849, before this case was presented or a tribunal constituted to decide upon it, have procured the same interpolations to be made in the printed report of the Minister Lafragua, read to the National Congress in December, 1846, a copy of which was in the hands of Mr. Benjamin at least as early as the fall of 1849.

After procuring these various forgeries and interpolations to

be made, the claimants must have induced numerous witnesses to elaborate and swear to a series of perjuries—minute, circumstantial and plausible—the invention of which displays nearly as much skill and ingenuity as the testimony in regard to them if false, discloses moral turpitude.

They must have succeeded in suborning, not merely a few nameless and obscure individuals, but numerous persons in high official and social positions; and especially Mr. de Bassoco, a gentleman venerable for his years, and respectable for the singular intelligence and amenity with which he sustained the protracted, acute, and most searching cross-examination of the counsel for the United States.

They must also have procured two ex-Ministers of Relations to perjure themselves, not merely by false testimony before a Commissioner in Mexico, but in Court, within our jurisdiction and subject to our laws, with a full knowledge that the Government alleged the claim to be spurious, and that no efforts would be spared to detect and punish those who were concerned in the supposed conspiracy to defraud it.

Again this vast conspiracy, from its nature, could not have been successfully carried out without the complicity or connivance, not only of nearly all the officials in the various offices at the alleged dates of the papers, from the lowest probationary clerk or "meritorio," up to the Minister of State himself, but also of those officers employed when the forged papers were afterwards placed in the archives, as well as of all those who still more recently have certified to their genuineness; and yet, from all these persons concerned in or cognizant of the crime, no whisper has been heard betraying the important secret. Mr. Black, the United States Consul, continues to attach his certificate to the papers without suspecting that he might be lending his aid to a conspiracy to defraud his own Government; and Mr. Forsyth, the United States Minister to Mexico, and for some time resident at the Capital, examines the documents at the various Ministries, and states that "they are found in the several offices where they appropriately belong, were produced by the

officers having custody of them, and that he saw nothing whatever to cause him to doubt their being genuine originals."

But the proofs of the genuineness, in part at least, of the documents obtained from Mexico, are obtained from another and an unquestionable source.

Among those documents was found, as has been mentioned, the dispatch of Pio Pico, with the original letter of Castillero of December 10th, 1845, conveying to the Supreme Government the first news of the discovery. There was also produced a traced copy of the borrador of the reply of the Minister.

It is stated by counsel, that the reception of these documents from Mexico first suggested to them the propriety of instituting a search for evidence of the correspondence in the Archives in the Surveyor-General's office.

The search was accordingly made, and there was found the draft of Pio Pico's letter to the Minister, the original of the Minister's reply, together with a letter from Castillero, clearly referring to a previous one of the 10th December.

I am not aware that the genuineness of these documents produced from the archives in this city is questioned.

It thus appears that the archives from Mexico are corroborated on the only points where, from their own nature, they were susceptible of corroboration by other records.

The existence of the documents now relied on to establish the title of the claimants, at least as early as the spring of 1847, and prior to the date of the supposed forgery, is also shown by testimony adduced by the United States.

We have already seen, that in James Alexander Forbes' letter of May 5th, 1847, he alludes to "the possession of two sitios ordered to be given by the dispatch of Señor Castillo Lanzas."

In his letter of July 14th, 1847, he speaks of the "two leagues conceded to Castillero and socios," and throughout his correspondence frequent and unmistakable allusions occur to the Lanzas dispatch, with reiterated expressions of distrust of its validity.

The same objections made to the document in 1847, are repeated and enforced up to February, 1850, long after the date of

the alleged forgeries, but without the slightest intimation that during that interval a second Lanzas dispatch had been fabricated. The document now exhibited is open to all the objections, and liable to every criticism originally made, and so constantly repeated, to the document received by Mr. Forbes in 1847. He complains, in 1850, that his suggestions relative "to the attainment of the important document," explained in his memorandum left at Tepic, in 1849, have not been acted upon. He expatiates upon the insufficiency and discrepancies of the Castillo Lanzas dispatch; but he nowhere breathes a word of reproach or complaint that an abortive and absurd forgery had been committed, the only result of which had been to leave the title as "imperfect and ambiguous" as before.

Had such been the case, we learn enough of Mr. Forbes' disposition from this correspondence to feel sure that reproaches would not have been spared.

There is one other consideration, and it is the last to which I shall advert, which naturally leads us to infer, independently of the proofs, that some proceedings similar to those alleged to have been had, must have taken place in Mexico.

So far back as the Ordinances of 1783, quicksilver had been the subject of distinct and special legislation. The fact that it was indispensably necessary to the extraction of the precious metals, gave to it an exceptional character, and an ample and cheap supply of it had been recognized as essential to the development of the mineral wealth of Spain and Mexico.

It is unnecessary to recapitulate the various decrees and laws of those countries designed to promote the discovery and production of this metal. It is sufficient to say, that out of the public revenues of Mexico a part had been devoted to the formation of a fund called the "Fondo de Azogues," to be used in searching for and developing mines of quicksilver. On every quintal produced a bounty was paid, and to those who should succeed in producing a specified quantity per year, a large sum of money was to be given.

The hope of discovering rich mines of quicksilver within the Republic had led the Junta to institute expensive explorations

in various parts of the country, and on all sides it seems to have been considered a national object of primary importance to liberate the Republic from its almost entire dependence on the mines of Almaden, from which the chief supply was obtained.

When, therefore, Castillero discovered a mine of which the "ley" surpassed in richness any that had previously been known, and when shortly afterwards he proceeded to Mexico, it is not conceivable that he should have neglected to inform the Junta of his discovery, and requested of it the assistance in the prosecution of his enterprise which it was one of the most important objects of its institution to furnish. That he would have desired the ratification of his mining possession, and especially a grant of two leagues, we may infer from the fact that he had already solicited a similar grant from the Governor of California.

That the Junta would have received the announcement with the utmost satisfaction, and zealously co-operated with him by recommendations to the Supreme Government, and aiding him by all means in its power, we might conclude even without any proofs of the facts; and proceedings similar to those alleged to have occurred, would have been the natural and almost inevitable consequence.

These proceedings may, it is true, have been interrupted by the breaking out of war and the alarming condition of public affairs; nor do the considerations last suggested authorize us to assume that the dispatch of Becerra, or that of Lanzas, were in fact written at their dates; but they justify the conclusion that the proceedings were initiated, and that the records of them produced from Mexico are at least in part genuine.

Having thus given an imperfect summary of the proofs offered by the claimants, I proceed to consider some of the objections urged on the part of the United States.

It is contended that neither Lazaro Piña, who is alleged to have carried the specimens of cinnabar to Mexico, nor Castillero himself, could have arrived in that city at the time indicated by the documents produced. If this be true, and an *alibi* can be proved as to those persons, we may well regard with suspicion documents found to be false in so important a particular. But

the proofs offered by the claimants on these points are too clear to admit of doubt.

We have already had occasion to notice the letters addressed by Castillero while in this country to Gen. M. G. Vallejo, at the christening of whose child he had assisted, and who thus became his compadre.

In a letter addressed to Vallejo, and dated February 21, 1846, Castillero says: "By the brigantine schooner which brought these communications," (referring to communications spoken of in the preceding sentence of the letter) "we have received information," &c. *"This vessel sails shortly, and will carry communications of what has occurred lately. Myself or Piña will leave in it, or both together.* I am only detained waiting the arrival of the division which may touch here in a day or two."

In another letter dated March 11, 1846, to the same person, he says: "Piña embarked on the 4th of this month in Monterey, and was dispatched in perfect order. He will travel post to Mexico."

These letters are produced by General Vallejo. He swears that they were received shortly after they were written. The signature and handwriting of Castillero are not disputed. If antedated, they must have been written by Castillero in Mexico, and sent on to Vallejo to be produced and sworn to by him—a supposition extravagant in itself, and disproved by the intrinsic evidence of the letters themselves, which contain allusions to passing events, and are couched in a style impossible to invent after the lapse of years.

In corroboration of this statement, the consular books of Mr. Larkin, then United States Consul at Monterey, have been produced. They are identified by Mr. Swasey, the consular clerk at that time. From these books it appears that the brigantine schooner "Hannah" was noted as about to sail to Mazatlan on the 4th of March, the day on which Castillero supposed she had actually sailed. It also appears that the Consul, desirous of sending dispatches to the United States, detained her three days, and a note in his memorandum book shows that she in fact sailed on the 7th

Shortly after the sailing of the Hannah, becoming alarmed for the safety of Colonel Fremont, who was then encamped on the peak of Gavilan, and expecting an attack, Mr. Larkin sent by a special courier dispatches to Santa Barbara, in the hope of intercepting the Hannah at that port, and of having them conveyed by him to Commodore Sloat at Mazatlan.

That the Hannah arrived at Mazatlan on the 1st April, we learn from various sources.

First. The "Diario Oficial," a newspaper published in the City of Mexico, contains in the number published on the 22d April, under the head of "Marine news. Mazatlan,—arrivals of vessels," a notice of the arrival at Mazatlan, on the 1st April, of "the American brigantine schooner 'Hannah' of eighty-nine tons, Captain Benjamin F. Thusum, and a crew of ten men."

Second. From a letter of Mott, Talbot & Co., merchants of Mazatlan, addressed to Mr. Thomas O. Larkin, and found among his papers since his decease.

This letter is dated "U. S. S. Portsmouth, 1st April, 1846," and informs Mr. Larkin that his letters have this moment arrived "per 'Hannah.'"

Third. Mr. Larkin's letter to Capt. Gillespie, a copy of which is found in his consular book, which Mr. Swasey swears to have written himself.

In this letter Mr. Larkin says: Capt. Montgomery, of the Portsmouth, being under sailing orders (the 1st or 2d instant), was waiting at Mazatlan for the Mexican mail, when Commodore Sloat heard *per brig Hannah*, of the situation of Capt. Fremont near St. Johns, and immediately dispatched the ship; she was twenty-one days from Mazatlan to Monterey."

Fourth. The positive statement of Mr. Swasey, clerk to Mr. Larkin, that the latter sent dispatches by the brig Hannah, in March, 1846, in consequence of which the Portsmouth came to Monterey.

These proofs leave no room for doubt as to the sailing of the Hannah from Monterey, in the early part of March, with Piña on board as a passenger, unless, indeed, we adopt the theory of the Government, and assume that the letter of Castillero to

Vallejo is forged, and that the latter has committed perjury; that the notes of entries and departures in Larkin's consular book are also forged; that the letter of Mott, Talbot & Co., is forged; that the letter of Larkin to Fremont, of March, 8th, as also his letter to Captain Gillespie of April 23d, are forged; that a number of the "Diario Oficial," purporting to be dated April 22d, has been prepared and procured to be printed, and a false entry of pretended marine intelligence from Mazatlan inserted in it; and, finally, that Mr. Swasey, and probably Mr. Larkin's son, have committed deliberate perjury in swearing to the genuineness of the books and papers of the deceased Consul. All this we must assume on the faith of a single statement made by Captain Paty, of the bark Don Quixote, to the effect that "Don Andres Castillero and his servant (*Lazaro Piña, I think, was his name,*) were passengers" on board his vessel, on her voyage from Monterey, in April, 1846. But, even supposing that Captain Paty's memory is accurate, and that Lazaro Piña did not sail in the Hannah, but remained to accompany Castillero in April, it only proves that the latter was mistaken when he wrote to Vallejo from Santa Clara that Piña had embarked on the 4th of March from Monterey. It may have happened, that in the three days during which Larkin detained the Hannah, something occurred to induce Castillero to countermand his orders to Piña, and to send his letters and specimens by another hand; for, it must be borne in mind, that proofs of the precise mode in which a few letters and specimens of ore were sent to Mexico fourteen years ago, cannot reasonably be exacted of the claimants. It is surely enough if they show that a vessel sailed about the time supposed, in which Lazaro Piña, or any other messenger of Castillero, might have been a passenger. If the United States contend that the letters and specimens were not and could not have been received in Mexico at the time indicated in the documents produced from that city, and therefore that those documents are false, it is for them to establish the fact.

It is also suggested that Castillero was not in Mexico at the time at which he is alleged to have presented himself before the Junta de Fomento.

The evidence relied on by the United States to support this assertion, consists of a publication in an evening paper in Mexico, of the 6th of May, 1846, of the receipt by the Government at the last moment before the paper went to press of important intelligence from California. As this intelligence was undoubtedly contained in the dispatches sent by the vessel which carried Castillero, it is inferred that he could not have arrived in time to be present on the 6th at a meeting of the Junta; and, therefore, that the actas are false.

That Castillero might have reached Mexico in the first days of May, is evident from the fact that he left Acapulco on the 24th of April.

As to the precise time at which the dispatches of which he was the bearer, or which had been sent by the vessel which conveyed him to Acapulco, arrived in Mexico, we have no means of ascertaining, except from the publication referred to.

The paper purports to have been published at three o'clock, P. M. of the 6th; as the dispatches were addressed to the Government, and not to the newspaper, it may be assumed that they were first delivered at the appropriate Ministry. What the diligence or energy of Mexican journalists may be, in obtaining the latest news, and how long an interval would probably elapse before they would possess themselves of the contents of a Government dispatch, we are wholly uninformed. That the news was communicated to the newspapers shortly after twelve M. of the 6th, may be inferred from the fact that it was in print at three, P. M. It is not surely unreasonable to suppose that the dispatch reached the Government on the previous evening, or early in the same morning. I see no reason why Castillero might not, after delivering his dispatches, have presented himself to the Junta on the same day. It appears from the minutes of the session of the 4th, that having learned the result of the assay, the Junta had made a reply to Castillero, asking him what aid he required. Castillero would naturally, therefore, have presented himself to the Junta immediately upon his arrival; for, besides the invitation of the Junta, and his other reasons for expediting the business, he had engaged the master

of the "Don Quixote" to remain for him at Acapulco on her return voyage. This Captain Paty testified he did. But after waiting at Acapulco from the 21st of April to the 18th of May he received news that Castillero would meet him at Mazatlan or San Blas. He touched at those places but heard nothing of him. The circumstance, apparently unimportant, that Castillero determined to rejoin the vessel at Mazatlan, and not at Acapulco, as originally intended, is in precise accordance with the arrangement alleged to have been entered into by him with the Junta, viz.: that he was to receive the sum of $5,000 in the form of a draft on Mazatlan.

The importance of this incidental corroboration is perhaps not great. It seemed, however, worthy of mention

But with regard to the inferences sought to be drawn against the genuineness of the actas, from conjectures as to the probable time of the arrival of the dispatches in Mexico, it seems to me obvious, on any hypothesis, that those dispatches must have been delivered, and Castillero have arrived in Mexico, in time for him to present himself before the Junta on the 6th, as their minutes show.

From the foregoing, it appears that the evidence on the part of the United States is insufficient, not only to disprove, but even to raise a doubt as to the fact of the reception of Castillero's letters and specimens, or of his own appearance before the Junta at the dates mentioned in the actas of that body.

But it is objected that the documents produced from Mexico are not admissible in evidence.

This objection is based on the ground that all muniments of title are incident to the land, and pass with it as if a part of it.

That, therefore, all archives of Mexico relating to the disposition of public lands in California, were included in the treaty and passed to the United States with the cession of the soil. It thus became the duty of the political power to execute the treaty with reference to the muniments, as well as the land, and until that is done, and the political power obtains those muniments and presents them to the Courts, the latter cannot judicially recognize their existence.

No authority directly in point has been cited in support of this position, but a vivid picture has been drawn of the possible evils which might result if adverse claims to the lands of the United States were allowed to be set up, founded on alleged public records existing in a foreign country, and proved by the depositions and certificates of foreign officials.

It will be seen that this objection would apply, although the genuineness and the sufficiency of the documents to convey title were undisputed. If a public and formal grant of a certain tract had been made, to establish which and to show the proceedings which led to it, evidence from the Mexican archives were necessary; if the Congress had by law conveyed a title to an individual, of which the only evidence existed in the reports of committees and the journals of that body, the principle contended for would require the Court to reject all such documentary evidence, no matter in what way proved or authenticated; for they are to be rejected, *not* because their genuineness is doubtful, but because they *are* archives and muniments of title to land.

It is admitted that, as a general rule, the right to muniments of title passes with the land, and he who owns the latter is owner of the evidences of his title to it.

But in the cases submitted to this Court under the Act of 1851, the inquiry always is, who is the owner, the United States or a private individual?

The United States, in consenting to be sued, and in submitting her rights to the determination of Courts, has abdicated, *pro tanto*, her prerogative as a sovereign, and appears before the Court precisely as any individual who asserts an ownership in land.

To say, then, that all muniments of title belong to the United States as owners of land, and cannot be noticed by the Courts until commended to them by the Political Department of the Government, is to assume the very point the suit was instituted to determine; for the question is—does the United States own the land? The claimant avers that she does not, and never did, and in support of his claim he produces muniments of title which, on the very principle contended for, belong to him and

not to the United States, for they are the muniments of title to his own land.

I cannot perceive, therefore, that the familiar doctrine of the common law, which regards title deeds as incident to the land and as passing with it, has any application.

In the argument submitted by the counsel for the United States, the distinction seems to have been lost sight of between the political rights of the United States as a sovereign and her purely proprietary rights as an alleged owner of land, which are alone passed upon in this class of cases.

In defining the boundaries of the Territorial Sovereignty of the United States; in determining whether a particular tract is within the limits of a territory the sovereignty of which has been ceded by treaty to the United States, the Courts must always adopt the construction given to the treaty by the Political Department (*Elam* vs. *Neilson*, 11 Peters R. 282). But when the United States consent to appear merely as a suitor in the Courts and to litigate her rights with an adverse private claimant, the rights of both must be determined by the application of the ordinary rules which prevail in actions between private individuals.

It is remarked by the counsel for the United States: "If the Judiciary were authorized to say what land was intended to be transferred, and what papers as muniments of title and incidental to the land, it might designate land and accredit papers which the Political Department did not, and thus conflict might arise within the Government itself."

But this is precisely what the highest authority of the nation has, by the law of 1851, enjoined upon the Courts to do. The very object of that law was, that the Courts *should* ascertain what lands passed to the United States by the Treaty, and what lands were private and did not pass. The question, by that law, was converted from a political to a judicial one, and no conflict could possibly arise, for the political and all other departments are by law required to be governed by the decision of the Court, which determines what is public land belonging to the United States, and what is private land belonging to individuals.

There is something repugnant to reason and justice in the

idea that the United States, after consenting to appear as an ordinary litigant before the Courts, and submit her proprietary rights to their determination, should suddenly, in the midst of the suit, throw off her character as a mere party to a suit respecting the ownership of land, or rather, without ceasing to be such, should resume and assert her sovereign rights, and announce to her antagonist that evidences of title he offers, though genuine and conclusive, shall not be admitted by the Court unless presented to it through and by herself; while, at the same time, she refuses to obtain them from the foreign government, or to receive them, if offered, or to present them to the Court, if received.

Compared with such manifest injustice, the evils which might result from possible impositions practiced on the Courts by means of forged archives, &c., are insignificant.

I think the general objection to the admissibility of the documents, because they are Mexican archives, not recognized as such by the Political Department of the United States Government, cannot be maintained.

Assuming, then, the documents from the archives of Mexico to be genuine and admissible, I proceed to consider their legal effect:

1. As to the alleged ratification of acts of the Alcalde Pico. This ratification is supposed, by the claimants, to be contained in the dispatch of Becerra to the Junta, of May 20, 1846, and in the marginal "acuerdo" on the letter of Vicente Segura, signed with the rubric of the same Minister.

The dispatch of Becerra announces, as we have seen, to the Junta, that "His Excellency [*i. e.* the President] has been pleased to approve, in all its parts, the agreement made with that individual [viz., Castillero] in order to commence the working of said mine."

The "acuerdo" on the margin of Segura's communication is as follows: "Granted, in the terms which are proposed, and with respect to the land, let the corresponding order issue to the Minister of Relations for the proper measures of his office, with

the understanding that the Supreme Government accedes to the petition."

An "acuerdo," or order on the margin of a letter, petition, or communication of any kind, is merely an expression of the determination of the Minister or other functionary to whom it is addressed, in regard to its subject-matter. Its chief use was to direct the clerks or other subordinates in the preparation of the reply, or in taking other action with regard to it. If the proceedings has been interrupted after the "acuerdo" is affixed, but before the dispatch is written or title issued as directed, it may be regarded, not unreasonably, as a species of equitable title, or as sufficient, coupled with other equitable circumstances, to justify the party in asking the completion of the proceeding so initiated. But when the title has issued, or the dispatch been written in pursuance of the "acuerdo," when the latter has been submitted to the Minister, and approved and signed by him, the dispatch so approved and signed is the highest and best evidence, not only of the action of the Government in the premises, but of the true intention of the "acuerdo;" for, surely, no argument is necessary to prove that an official reply, signed by a public officer, is better evidence of his resolution, with regard to a particular application, than a direction to his subordinates as to the form in which the reply is to be drafted.

Dismissing, then, the "acuerdo," or rather treating it as intending precisely what the dispatch, prepared in obedience to it, expresses, let us consider the true import and effect of the latter.

It will be observed that the dispatch of Becerra does not, in terms, profess to ratify any mining possession or grant, either of lands or of pertenencias. Nor does it announce that the President has been pleased to make such ratification. It merely informs the Junta that His Excellency has approved an agreement made by the Junta with Castillero.

It is not pretended that any such agreement was, at that time, or afterwards, formally entered into between the parties. The propositions of Castillero are dated May 12th. The communication of the Junta is dated May 14th, and Castillero himself, in

the preamble to the statement of his propositions, expresses his persuasion that the Junta will accede to his request "so far as may be within its powers, and that it will send up to the Supreme Government with a recommendation that which may require the decision of the latter."

From the communication of the Junta it is evident that the authorization of the Supreme Government was necessary to enable it to furnish Castillero with the iron retorts and flasks belonging to it, as also to make him the loan he solicited of $5,000, payable in quicksilver at $100 per quintal, and without the five per cent. premium per annum which the law required it to exact.

Until the approval of the Supreme Government of this proposed arrangement could be had, no formal contract could be entered into. It was, therefore, not until May 25th, and after the receipt of Becerra's communication approving the proposed contract, that the Junta resolved "that the proper judicial agreement be drawn up immediately, and that application be made for the draft for the $5,000 on Mazatlan or Guadalajara," as appears by the actas of that day.

That the agreement was never so drawn up and executed is admitted; and on the 29th of May an order was made for the payment of the Notary Calapiz "for proceedings relative to it," its consummation having been prevented by the order suspending all payments out of the quicksilver fund.

The language of the dispatch is, therefore, evidently inaccurate in speaking of the approval of the agreement *made* or "*convenio celebrado*" with Castillero. Its evident intention was to signify the approval by the Government of the agreement proposed to be made, and which the Junta had expressed its willingness and even anxiety to enter into.

What the agreement was, which, after the approval of the Government had been obtained, the Junta and Castillero had fixed upon and nearly consummated by a formal act before a Notary, we learn from the Report of the Junta of November 17th, 1846, produced by Señor de Bassoco, and embodied in Mr. Lafragua's report in December of the same year.

In this report, the Junta, after giving an account of the presentation of cinnabar ore, &c., by Señor del Moral, of its assay, and of their inquiry of Castillero what aid he required, proceeds as follows:

"The Señor presented his petition in due form, and it having been very attentively examined by the Junta, he made his propositions, to which this Junta agreed, to wit: That there should be delivered to him $5,000 in money, eight iron retorts of those which the Junta ordered to be made for the examinations previously made, and all the quicksilver flasks it had in the negotiation of Tasco; Señor Castillero obligating himself, on his part, to repay said advance in quicksilver at the rate of $100 per quintal, within six months from his leaving the port of Mazatlan. This agreement was approved by the Supreme Government on the 20th of the same month; but on account of the declaration of blockade made by the United States of the North, when he was about to receive the draft on Mazatlan, the Ministry issued the order of September 19th of this year, directing the suspension of all payments of the branch of quicksilver, except those for the support of the College and the expenses of the office."

In this account of the cause, and the date of the abandonment of the agreement with Castillero, the Junta are evidently inaccurate; for their own actas show that the communication informing them of the blockade of Vera Cruz and Tampico, and directing the suspension of all payments for the extraction of quicksilver, was dated on the 27th of May, and received by the Junta on the 28th; and on the 29th, the Notary Calapiz was paid for his proceedings in relation to the intended contract.

The communication of the 19th of September ordered that the assets of the quicksilver fund should *continue to be used merely for the support of the College*, and it demanded a loan of $25,000 from the Dotal Fund. This was strenuously opposed by some of the members, on the ground that the Dotal Fund was the private property of the creditors of that fund. As these discussions occurred less than two months previous to the date of the report of the Junta, and were no doubt fresh in its recollection, and as the report was prepared in great haste, only eight days

being allowed for the purpose, the Junta fell into the error of ascribing the breaking off of the negotiation with Castillero to the order of September 19th, instead of to that of the 28th of May.

But with respect to the agreement made with Castillero, and approved by the Supreme Government, the report is very explicit. It sets forth the terms of that contract with a clearness which leaves no room for doubt as to what it was that the Supreme Government approved.

The agreement thus entered into embraced all the subjects upon which the Junta had authority to act. Nor can it be said that the approval of the Supreme Government was only required as to those propositions of Castillero which related to the ratification of his mining possession and a grant of two leagues, for we learn from the letter of the Junta that that body had no authority, without the approval of the Government, either to sell the retorts and flasks desired by Castillero, or to lend him a large sum without interest, to be repaid in quicksilver. But with the granting of lands, the Junta had nothing to do, and whatever might have been the resolution of the Government on Castillero's seventh and eighth propositions, it would never have been communicated to the Junta in the form of an approval of an agreement into which they were supposed to have already entered.

Some stress has been laid on the use of the word "concedido," or "granted," in the marginal "acuerdo" of Becerra.

Had this word appeared alone, and been written on the margin of Castillero's petition, it might, perhaps, have been considered evidence that the whole prayer of the petition had been granted. But it is written on the margin of the Junta's letter, and clearly imports that its request was granted, viz., that the proposed agreement was approved, as is unequivocally shown by the official dispatch written on the same day, and in pursuance of the marginal order of the Minister.

We shall presently see that the petition of Castillero was for land, and not for additional mining pertenencias.

The acuerdo therefore adds:—

"With respect to the land, let the corresponding order issue

to the Minister of Relations, for the proper measures of his office with the understanding that the Supreme Government accedes to the petition."

The corresponding order did issue—we have it in Becerra's dispatch to the Minister of Justice. The proper measures were taken in his office—we have them in his dispatch to the Governor of California: and from it alone can we learn what was done by the Government "with respect to the land" petitioned for by Castillero.

It has already been stated that the Act of Possession of the Alcalde Pico embraced two distinct objects: first, the judicial possession of a mine, with the number of pertenencias allowed by law—but, how many, both the Alcalde and the parties seem to have been uncertain; secondly, a grant of a tract of land extending three thousand varas in every direction, as a "*gracia*" or gift to Castillero. The distinction between these two acts of the Alcalde is not only admitted but strenuously insisted on by the counsel for claimant, and it was contended that the first was legal and valid, while the second is conceded to be utterly nugatory and void.

When, therefore, Castillero asked that the Junta would recommend the approval by the Supreme Government of the possession which had been *given him* of the *mine*, in the same terms as those in which he then held it, he must have intended to ask either for a ratification of the possession of the mine, or for an approval of the grant of three thousand varas of land, or for both.

That he did not ask for three thousand varas to be given him as additional pertenencias, is admitted by one of the able and eminent counsel who argued the cause for the claimant.

In the printed report of his argument, he is asked by Mr Randolph, of counsel for United States:

You argue, then, that the Junta, misunderstanding this document of Castillero's, supposed it to be for additional pertenencias and as such recommended its confirmation.

Mr. Benjamin.—"Certainly."

But this was not the only error into which the Junta fell; for

they not only supposed that Castillero was seeking additional mining pertenencias, and merely a tract of land for his hacienda, &c., as well as two square leagues to supply wood for his burnings, but they supposed the three thousand varas so desired, would only amount to fifteen pertenencias, whereas they would amount to nine hundred. The Junta evidently supposed that Castillero solicited a tract three thousand varas long, and of the width of one pertenencia. As a pertenencia is two hundred varas in length, a tract three thousand varas long would comprise exactly fifteen pertenencias. They overlooked the fact that the tract was to be three thousand varas "*in every direction*," or six thousand varas square, making nine hundred pertenencias.

If then, the Supreme Government had formally and unequivocally signified its assent to this recommendation of the Junta, and ratified the possession as represented by them, it may well be doubted whether in a Court of Equity it could be deemed to have ratified any more than a possession of fifteen pertenencias, which was all that Castillero, speaking through the Junta, demanded.

But the fact, that the Junta thought it necessary to devote so much time, and to suggest so many arguments, to induce the Supreme Government to ratify a supposed mining possession of fifteen pertenencias, justifies the supposition that had they known it to have comprised nine hundred pertenencias, they would probably have withheld their recommendation.

That both the Junta and the Supreme Government were willing to assist the enterprise of Castillero by every means in their power, is evident. Their object in so doing, was not to confer a favor on Castillero personally, but to promote the production of quicksilver in the largest quantities, and at the cheapest rates possible.

The same policy would have forbidden them to give a single miner nine hundred mines, of one pertenencia each, and thereby to exclude from so large a tract all miners who might otherwise have discovered and developed new mines in the vicinity, and increased the production and diminished the price of the metal the Government was so anxious to obtain.

It has appeared to me that the very considerations urged by the counsel of the claimant with regard to the policy and interest of Mexico in promoting the production of quicksilver render it impossible that it could, consistently with that policy, have consented to a monopoly by a single miner of a mining tract of such enormous dimensions.

It is clear, therefore, that the Supreme Government could not have intended to ratify the possession of the three thousand varas as mining pertenencias.

But we have already seen that the approval by the Government of the agreement made by the Junta, is conclusively shown not to import a ratification or grant of any pertenencias or lands whatsoever; for the terms of the agreement so approved are disclosed to us by the Junta itself, and can be ascertained as exactly as if the formal instrument had been executed by the parties, the approval of the Government appended to it, and were now before us.

It does not appear that the Act of Possession of Pico was ever exhibited either to the Junta or the Supreme Government. If it had been, it would have disclosed the fact that the mine had been denounced and possession of it given, as on the lands of José Reyes Berreyesa. It would also have been seen that the Alcalde had assumed to grant a tract three thousand varas in every direction from the mouth of the mine, which must have included a large portion of the land of a private individual, even supposing that the mine itself might not have been within his limits. Adopting the obvious construction of the Act of Possession contended for by the claimants, and regarding that act, and the ratification asked for by Castillero, as referring to a tract of land and not to additional pertenencias, and assuming with the distinguished counsel for the claimants, that the Junta was mistaken in supposing that any number of additional pertenencias, whether fifteen or nine hundred, were asked for, we may well doubt whether the Supreme Government, if informed that this tract would in great part include private property, would have so readily made the grant. We have no reason to suppose that, as between individuals at least, rights of property are not

as scrupulously respected and enforced by the Mexican as by other nations.

Again, it is contended that in addition to the grant of three thousand varas in every direction, made by the Alcalde and approved by the Supreme Government, there were also granted to Castillero two square leagues of land, to be measured in like manner from the mouth of the mine.

The mode adopted and the precautions observed by the Supreme Government in signifying its willingness that such a grant should be made, will hereafter be adverted to.

Our only concern with it at present is to observe, that on the claimant's theory, the Supreme Government first ratified a concession of six thousand varas square, or more than a league and a quarter in extent, and then issued orders for a further grant of identically the same land, with three-quarters of a league in addition. Its resolution with regard to the latter is formally and regularly communicated to the Governor of California, who was directed to take the proper steps to carry out the intention of the Government; while with regard to the former, its determination is supposed to be expressed in a declaration that it approves a contract, the terms of which we know, and which has no reference, nor could it have had, to grants of land; and the approval of which, if it could by possibility be construed to mean an approval of all Castillero's propositions would import a grant of the two sitios, as clearly as it would import a ratification of the concession of the six thousand varas square.

But the dispatch of Becerra to the Minister of Relations informs us to what part of Castillero's petition the President thought proper to accede, in language too explicit to be misunderstood.

After transcribing his letter to the Junta, Becerra says: "And I have the honor to transcribe it to your Excellency, to the end that with respect to the petition of Señor Castillero, to which his Excellency the President *ad interim* has thought proper to accede, *that* there be granted to him two square leagues as a colonist," &c.

It is insisted by the counsel for the claimants, that the words

"*that there be granted to him two square leagues as a colonist,*" are descriptive of the petition of Castillero to which the President acceded. The observation is just. Such is no doubt the true construction of the dispatch, and it establishes beyond doubt, that in acceding to the petition the President meant only to accede to that part of it which asked for a grant of two leagues as a colonist, without expressing any resolution as to the application for a ratification of the concession of three thousand varas.

As, then, the supposed ratification is not contained in the approval of the contract of the Junta, nor in the acceding by the President to the petition for two leagues in colonization, it must be found, if at all, in the word "concedido" or "*granted*" in the acuerdo. But for the reasons given above, I am satisfied that no such signification can be attached to that word in the face of the dispatches written in pursuance of the acuerdo, and which embody and explain its meaning.

But if any doubt could remain as to the true intention and effect of the approval of the Junta's contract, it would be dissipated by the evidence afforded by the acts of the parties, of the construction placed upon it by themselves.

Throughout the whole negotiation for the purchase of barras or shares in the mine, conducted by Mr. Negrete on behalf of Mr. Forbes with Castillero in person, the latter, though urged to exhibit his documents of title, produces only the dispatch of Castillo Lanzas for two leagues. In the instrument of ratification the mine is spoken of as of three pertenencias in extent, and Castillero "cedes in favor of the contractors of supply (aviadores), and for the sixteen years of his contract, the two square leagues of land of which the Government has made him a concession, as shown by the official document which he presents, that it may be inserted at the end of the present instrument."

The Lanzas dispatch is accordingly copied in the instrument, but not the slightest allusion is made to any other grant of three thousand varas in every direction made by an Alcalde, and approved by the Supreme Government.

In all the transactions between the parties, the idea is but once suggested, that the approval of the Junta's contract with Castillero imported a ratification of the Alcalde's concession of three thousand varas.

It occurs in Alexander Forbes' letter to James Alexander Forbes of February 3, 1850. In that letter Mr. Forbes says:

"We think at present it may be the best plan to get an authenticated copy of the approval by the Mexican Government of the three thousand varas given by the Alcalde on giving possession of the mine. As a doubt may be started as to whether the Alcalde, acting as the Juez de Mineria, had a right to make this grant, yet, if approved by the Mexican Government before the possession of the country by the Americans, there could be no doubt on the subject. This takes in our hacienda, and *unless opposed by the Berreyesas*, would, I should think, settle the question. *Castillero says such an approval was given*, and that on his arrival in Mexico he will procure a judicial copy of it. *This is the plan we shall adopt*, if we hear nothing from you to alter this resolution.

"Since writing the foregoing, I have looked over your private letter to William Forbes, dated 18th October, in which you state the limits or boundaries as follows: 'The boundaries must be expressed as joining on the north and northwest by lands of the ranchos de San Vicente and de los Capitancillos, and the east, south and west, by Serrania or Tierras baldias'

"Castillero is *not certain of accomplishing this latter plan*, but thinks the first, *that is the three thousand varas, the best.*"

It will be observed that this letter unmistakably discloses the "plan," which James Alexander Forbes had suggested, and Alexander Forbes adopted, of obtaining fraudulent and antedated documents from Mexico expressing the boundaries of the two sitios, &c. No reliance can therefore be placed on the statement that Castillero said the approval was given.

But whatever he may have told Mr. Forbes, the approval and the agreement approved are before us, and we have already seen that they contain no allusion to any concession of land by an Alcalde.

The silence of Castillero during his negotiations with Mr. Negrete, is far more significant than any statement made four years afterward to Mr. Forbes, nor can it be said that at the time of those negotiations he was ignorant of the action of Government; for the Castillo Lanzas dispatch, then in his possession, and inserted at the end of the contract of ratification, recites the Becerra dispatch, which contains the approval of the contract. the parties were in Mexico; the public offices were accessible, and it would have been easy to ascertain what was the contract approved. That Castillero knew what that contract was cannot be doubted; and yet he and all the other parties, through a series of years, treat the dispatch as a concession of two leagues, but never suspect it to contain evidence of, or to be in itself, a ratification of the Alcalde's gracia, or gratification. Even so late as the date of Mr. Halleck's affidavit, James Alexander Forbes, with the notarial copy of the Lanzas dispatch in his possession, never seems to have imagined that the dispatch of Becerra inserted in it, and announcing the approval of the Junta's contract, constituted the ratification he so much desired of the Alcalde's grant of three thousand varas.

I think it clear, therefore, that the dispatch of Becerra cannot be construed to import a ratification of the action of the Alcalde, either in respect to the possession of the mine, or to the grant by him of three thousand varas.

As to the alleged grant of two leagues. It cannot be denied, that if the documents produced by the claimants be genuine, they show that Castillero presented a petition for two square leagues of land; that this petition was by the Junta de Fomento submitted to the Supreme Government; that the Junta was formally apprised by the Minister of Justice that the proper communication had been sent to the Minister of Relations, that suitable orders might be issued by him with respect to that part of Castillero's petition; that a communication was accordingly sent to that Minister, informing him that the President had acceded to Castillero's petition, and requiring him to issue the corresponding orders; and that the Minister of Relations, in pursuance of these instructions, transcribed the communication to

the Governor of California, in order that in conformity with what the laws and dispositions on colonization provided, he might put Señor Castillero in possession of the said two leagues.

It is manifest that this dispatch of Castillo Lanzas does not by its terms grant the land solicited. It contains no words translative of title; it is not addressed to the supposed grantee, but to the Governor of California; it cannot have been intended to serve as a muniment of title to Castillero, for otherwise it would have contained formal words sufficient to vest the estate in him. It is merely an official communication addressed by one executive officer to another, which, for aught that appears, might as well have been sent to the Governor of California by a courier as by the hands of Castillero. It contains, however, an unequivocal official declaration that the President of the Republic had thought proper to accede to Castillero's petition, and an order to put him in possession conformably to the laws on colonization.

The case thus resembles in some respects that of *United States* vs. *Lecompte*, (11 How. 124,) where the claimant had obtained an order from the Lieutenant-Governor directing the Procurador del Comun to put him in possession, if in so doing no prejudice would result to third persons.

The petition solicited two leagues at the place called Llanacoco, to be located so as to include the entire prairie of that name. The Supreme Court held that the order of the Lieutenant-Governor could not be construed to signify an absolute unconditional grant of any specific land; and, as it was never presented to the Procurador, and the land had never been severed from the public domain by that officer, and no occupation was shown which could supply the deficiency by giving certainty and definiteness to the claim, it was rejected.

If the reasoning of the Supreme Court be attentively considered, it will be seen that they refused to treat the order of the Lieutenant-Governor as an absolute grant, for two reasons: 1st. Because it directed the petitioner to be put in possession, "if in so doing no prejudice could result to third persons," and the matter was referred to an officer, to whom the duty was

confided of ascertaining the means, &c., of the petitioner and "judging of the propriety of the grant." And 2d. Because the land was not severed from the public domain by the description in the concession, or by authorized survey, or by any definite occupation.

It may, I think, be inferred from the whole opinion, that if the concession had described any tract which could be identified. and the petitioner had occupied it, the claim would have been confirmed, notwithstanding the omission to present the order to the Procurador. In the case at bar, the Governor is ordered to put the petitioner in possession "in *conformity with what is prescribed in the laws and dispositions on colonization.*"

The 2d article of the law of 1824, declares that "those lands of the nation, which are not the property of any individual, corporation or town, are the subject of this law, and may be colonized."

The first step to be taken by the Governor, in execution of the order, would have been to ascertain whether the land was within the colonization law—that is, whether it was the land of the nation, or belonged to any private individual; precisely as the Procurador was to ascertain whether by putting the petitioner in possession, any injury would result to third parties.

To construe this dispatch as an absolute grant of a specific tract, we must suppose Castillero to have practiced on the Government a gross fraud, either by concealing or misstating the facts. For, even admitting that he had reason to believe that the mine itself was not within the limits of Berreyesa, he must have known that a tract of two leagues measured in all directions from the mouth of the mine, would certainly have included a portion of his land.

The counsel for the claimants, feeling, no doubt, the force of this objection, suggested that it was intended that inquiry should be made by the Governor, and the two leagues were to be located in such a way as not to include private land. But this admission proves that the duties to be performed by the Governor were exactly those assigned to the Procurador del Comun, in

the case referred to; and if the order to put in possession was not a grant in that case, neither can it be so considered in this.

The case at bar is, in some respects, stronger than that reported; for here, the order was addressed to the Executive of a Department to whom, by the laws, in conformity to which the order was to be executed, it belonged to issue the formal title for the land, while the functions of the Procurador were merely to inquire into and report the circumstances of the petitioner, and to mark off and sever from the public domain the land granted.

Had the Governor and Departmental Assembly, in ignorance of the application of Castillero, and the action of the Supreme Government upon it, regularly granted the same land to another person, in strict conformity with the colonization laws, I cannot doubt that his title, though subsequent in date to the dispatch of Lanzas, would have prevailed; and on the reception of that dispatch the Governor would either have refrained from executing it at all, or would, more probably, have allowed Castillero to take his two leagues out of the nearest body of ungranted land.

In the very ingenious brief filed by the counsel for the United States, it is observed:

"The theory of government for the Mexican Territories or Departments was, that all the powers of government were exercised immediately by the local Political Chief or Governor, through whom the will of the Supreme Central Authority at the City of Mexico was transmitted, and by the action of which functionary, and not otherwise, it became operative on persons and things. It was a government of governments—the plan which Spain established in the beginning for the government of the Indies, and which Mexico continued to this extent without a change. Its model was the organization of an army. It was the same whether the Sovereign's will was expressed in the form of a general law, or some particular disposition like a grant; all were alike instructions to an inferior officer. They were not binding on him until known, nor effective until obeyed—until he had done or suffered another to do that which was required.

"The Local Representative of the National Sovereignty was

invested with all the active powers of Government in this Department. He alone could manifest the grantor's will, and from Mexico no more could come than the impulse which should move him to act. In these titles, nothing was done here, even the mining title being an original grant in Mexico. The Local Representative has never acted, and therefore there has been no expression of the grantor's will."

In this lucid exposition of the general theory on which the vast governmental machinery of the ancient Spanish Monarchy, and measurably that of Mexico, were constructed, I entirely concur. But if it be argued that because the will of the Sovereign was ordinarily communicated to and executed by subordinate agents, he had no power himself directly to act upon persons and things without intervention of the local authority, I cannot assent to the conclusion; for the will of an absolute Sovereign can be manifested in whatever form he may choose to adopt; and had the King of Spain seen fit to make, under his own hand and seal, a grant to a subject in a remote province, I cannot suppose that the royal patent in the subject's hands would not have been respected by the subordinate authorities, notwithstanding that the title had been transferred, and the grant consummated without their intervention.

Nor is it certain that the order of the Sovereign to a subordinate to make a grant to a subject, or do any other act in the performance in which he is interested, is a mere nullity, until known to and obeyed by the inferior officer.

If, as is admitted, the impulse which moves the subordinate to act, rightfully proceeds from the central authority—if the subordinate has no discretion in the premises, but must obey, and his duties are purely ministerial and executive, it would seem that the sovereign disposition which required him to act, cannot be regarded as a mere nullity, even though never in fact obeyed.

Such, I understand to have been the ruling of the Supreme Court in a recent case, where an order to the Governor that a particular island should be assigned to an individual was held itself "to adjudicate the title;" the formal issuing of the title-

papers being a merely ministerial act to be performed by the Governor.

It is true, that, in that case, the order was received and obeyed and the title issued. But, the language of the Supreme Court is explicit, that the dispatch "operated of itself *to adjudicate the title to the claimants.*" This case will be more fully considered hereafter.

But whether a notice of the *superior will* must have been given to the local representative of the Government, and that will must have been obeyed before it could affect the rights of persons, or the condition of things; or whether, as seems to be considered by the Supreme Court, the sovereign disposition, though unknown to, and unobeyed by, the local authority, had an immediate and independent operation, it is clear that by the uniform practice of the Spanish and Mexican Governments, the dispositions of the sovereign authority always contemplated the instrumentality of the local subordinate.

If, therefore, in this case the Government had known that the tract solicited was public land, and that no objection whatever existed to making the grant, it would have been a signal departure from its ancient and established practice to issue the grant directly to the applicant.

In treating, then, this dispatch as an order to make a grant, we suppose the Government to have conformed to its immemorial and traditional usages. While to consider the dispatch as itself conveying the title, and containing merely an order to the Governor to put the claimant in possession of land already granted to him by the direct act of the Supreme Government, is to suppose the latter to have adopted an exceptional mode of proceeding, inconsistent with that pursued in the island's case, and with the theory on which the whole system of government was organized.

For these reasons I cannot regard the dispatch of Lanzas as a direct grant of the two leagues referred to.

Taking this view of the dispatch, we cannot account for the very explicit declarations of the Mexican Commissioners, that

no grants had been made of land in California subsequent to May 13, 1846.

For, even if their researches had extended to the official correspondence of Ministers of Relations who had held office from the date of the declaration, and they had discovered the dispatch of Lanzas, they regarded it but as an order to the Governor to make a grant, which they knew could never have been acted on. The truth of their declarations, therefore, to the American Commissioner, is thus entirely consistent with the genuineness of the documents, while, if the dispatch be considered to import an absolute and present grant, we are driven to choose between two alternatives—one, that the Commissioners were guilty of a deliberate falsehood—the other, that the dispatch itself is a forgery.

But the dispatch, though not itself a grant, is, nevertheless, evidence that the Supreme Government acceded to Castillero's petition; and it is, at least, an order that a grant should be made to him by the Government of California, in conformity with the colonization laws, *i. e.* if the land were vacant and no other insuperable objection existed.

Giving then this construction to the dispatch, let us consider its legal effect—and here we are fortunately not without authority to guide us.

In the case of *Andres Castillero* vs. *The United States*, for the Island of Santa Cruz (23 How. 464), the claimant relied on a dispatch of the Minister of Interior, in many respects resembling that of Castillo Lanzas.

In that dispatch the Minister informs the Governor, that in consideration of the services and merits of Castillero, the President directs him (the Minister) "to recommend Castillero very efficaciously to your Excellency and the Departmental Junta, in order that before proceeding to the distribution which should be made conformably to the laws, and as is directed in the order of this date, of the lands of the islands adjacent to that peninsula, there be assigned to that individual the one which he may select of those nearest to the place where he should reside with the troops under his orders."

It will be noticed that the terms of this dispatch are not in some respects so strong as those of the dispatch of Lanzas.

It is not said that the President has acceded to a petition for any particular island or tract of land. Castillero is merely "recommended very efficaciously to the Governor and Depart mental Junta," and this recommendation is made in order that there be "*assigned*" to him the island he may select, &c.; contemplating, evidently the execution and delivery by the Governor of the formal title for the island so selected. In the Lanzas dispatch, the President's assent to the petition is communicated to the Governor, "in order *that he may put Castillero in possession* of the land"—an expression which has afforded room for the construction that no further title-paper was designed to be issued.

In the Santa Cruz Island case, the Supreme Court held that "the dispatch of the Government operated to adjudicate the title." Its language is:

"They (the Governor and the Junta) were accordingly directed not to proceed to make adjudications under the previous order until the assignment of the title to this claimant was perfected, but they were *not required to make the assignment or to cause it to be made.*

"To accomplish that purpose, and to carry into effect the command of the President, two things only were necessary to be done; one was to be performed by the claimant, and the other was a ministerial act. It was the claimant who was to make the selection, and if it was a proper one, near the place where he was stationed with his troops, nothing remained but to make the assignment as described in the dispatch. Emanating as the dispatch did from the supreme power of the nation, *it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the Department.* Neither the Governor nor the Assembly nor both combined, could withhold the grant after a proper selection, without disobeying the express command of the Supreme Government. *Nothing therefore, remained to be done, but to issue the title-papers, and that was*

the proper duty of the Governor as the Executive organ of the Department.

This language would seem too clear for misconstruction. It seems to me an express decision, that an order of the Supreme Government directing the Governor of a Department to make a grant, operates to adjudicate the title to the land specified. It could not, however, have been meant that the order itself was an absolute grant; for it was evident that the formal grant was to be made by the Governor, and besides it did not refer to any particular island, but to such island as Castillero might select; and it was only after the selection was made and found to be a proper one, that the title attached to any particular piece of land.

If such were the effect of the order of Pesada, I am unable to perceive why the Castillo Lanzas dispatch must not be considered to have had a like operation. The direction in that dispatch to the Governor to put Castillero in possession in conformity with the laws and dispositions on colonization, confided no more discretion to him than the duty of seeing that the island selected was a proper one, confided to the Governor in the case before the Supreme Court; and if the issuing of the title-papers in that case was a "merely ministerial act," to be done in respect of land, the title of which had already been adjudicated to the claimant, the same view must be taken of the action, which construing the Lanzas dispatch least favorably for the claimants, Governor Pico was in this case ordered to take.

It is contended that the President of Mexico had no authority to make the order for a grant contained in the Lanzas dispatch.

But, 1st. It is apparent, both from the action of the Supreme Government in this case, as well as in that of the islands on the coast, that it exercised the power.

The presumption, therefore, arises, that it had the authority it exercised. "The public acts of public officers purporting to be exercised in an official capacity, and by public authority, are not to be presumed to be usurped, but a legitimate authority previously given or subsequently ratified, which is equivalent." *The United States* vs. *Arredondo*, (6 Pet. 728.)

2. The Colonization Law of 1824, while it enjoined upon the States of the Confederation the duty of making laws or regulations for colonizing within their respective limits, committed the whole subject of colonization in the Territories to the Supreme Executive.

The 16th article of that law provides, that 'the Executive shall proceed in conformity with the principles established to the colonization of the Territories."

In pursuance of this authority the Supreme Executive, in 1828, framed the regulations which prescribed the mode in which the colonization of the Territories should be effected.

It was from the dispositions thus made by the Supreme Executive, that the Governor and Junta in the Territory of California derived all their powers with respect to the granting of land.

Had the President seen fit to confide the authority to grant, either to the Governor alone, to the Prefects of the Partidas, or to local Commiseioners, he might have done so, or he might have retained it exclusively to himself.

The regulations, in fact, provided that concessions made by the Governor should not be definitely valid unless approved by the Departmental Assembly; and, in case its approval was not obtained, the Governor was to report to the Supreme Government for its decision.

Grants made to "empresarios" were, by the 7th regulation, not to be held as definitely valid until the approval of the Supreme Government was obtained.

It thus appears, not only that the authority of the Governors with respect to colonization was not immediately conferred by any law of Congress, and owed its existence to discretionary regulations of the Supreme Executive, but that by those very regulations the Executive reserved to itself an important part of the granting power. After the adoption of the Central System, and the division of the whole Republic into Departments, the right to dispose of all the lands belonging to the nation seems to have been confided to the Supreme Executive. The Law of 1837 gave to the President authority to sell or pledge

them, and by his decree of 11th of March, 1842, other important and fundamental changes in the colonization laws with regard to foreigners were made by General Santa Anna.

It is said by making a grant directly to an individual, or in directing the Governor of a Department to make one, the President violated an existing law, which even an absolute monarch cannot do; for he may abrogate or modify the law, yet while it remains unrepealed he cannot violate it.

The general principle is admitted, but its application to this case is not perceived.

That the President, by the law of 1824, could have reserved to himself the whole right of making grants in the Territories, has already been shown. Such a disposition, though not in accordance with the ordinary policy of the Spanish and Mexican Governments, which intrusted the administration of local affairs to local subordinates by whom the orders of the Supreme Government were carried into effect, would, nevertheless, have been legal and within the limits of the discretion confided to the Executive by the law of 1824.

This power he still retained, notwithstanding that he had framed general regulations on the subject for the guidance of the Governments of the Territories; for those regulations were the mere creature of the President, and could not deprive him or his successors of the general powers given him by law, or of the right to act directly in special cases by making the grant himself, or by ordering the Governor to do so.

The Governor of a Department had no power to grant lands by virtue of his office, or conferred on him as such by law.

All his authority to grant was derived from the regulations of the Executive, of whom he was but the agent and the instrument. He was at all times subject to Executive instructions, and the President might at his discretion withdraw any lands from colonization, prescribe new qualifications for grantees, or in any other manner modify the Governor's authority with respect to grants, or direct him as to its exercise.

That he did so interpose with regard to certain Mission lands which the Governor and Assembly were about to grant is well

known, and this Court has decided grants in violation of the order of the Executive to be invalid. The islands cases and the case at bar furnish additional instances of the exercise of the same power.

I confess myself unable to understand how a grant by the President, still less an order to his local subordinate to make a grant, can be deemed such a violation of the law as no absolute monarch could commit, or indeed any violation of law whatsoever.

3d. The question is decided by the Supreme Court in the case which has been referred to.

If the Supreme Government had power to direct the title-papers to be issued, and the dispatch operated to adjudicate the title in that case, it must be deemed to have possessed the same authority, and a similar operation must be attributed to the dispatch in the case at bar.

But it is urged that a distinction should be drawn between the cases, on the ground that islands on the coast were not within the Colonization Law of 1824, and therefore might be granted directly by the Supreme Executive, but that he had no authority to act in relation to lands embraced within the provisions of that law, except in obedience to it, and in conformity with the regulations of 1828.

It has already been shown that under the Colonization Law the President had authority either directly to grant, or to order the Governor to grant, public lands in the territories. But his power to grant islands was also derived from the same law, and in making the grant of the island of Santa Cruz, the validity of which has been affirmed by the Supreme Court, he acted in strict obedience to it.

It will also be seen that the judgment of the Supreme Court is not based on the supposed existence of any authority in the Executive not derived from the law of 1824; and also that his right to repeal or modify at his will, in a particular case, his own general regulations which imposed rules on the subordinate local authorities, is impliedly recognized in the decisions referred to.

The 4th article of the law of 1824 provides, that "the lands embraced within the twenty leagues bordering on any foreign nation, or within ten leagues of the seacoast, cannot be colonized without the previous approbation of the Supreme Executive power."

As by the previous section of the law, the Congresses of the various States were directed to enact laws and regulations for colonization within their respective territories, while by Art. 16 a similar duty was enjoined upon the Supreme Executive with respect to lands within the territories, it is obvious that the 4th article was intended chiefly to restrict the power of the States rather than that of the Executive, whose assent to the grant was all that was required.

In the case of *The United States* vs. *Arguello*, (18 How., 548,) it was held by the Supreme Court that the "colonization" spoken of in the 4th article must be construed to mean colonization by foreigners, and not the distribution of lands to individuals and families.

The power of the Governors of California to grant lands within the ten littoral leagues might perhaps have been sustained, even if the 4th article be construed to apply to grants to individuals, on the ground that the absence of any express prohibition in the regulations, and the constant exercise of the power with the full knowledge of the Supreme Government, authorize the presumption that the approval required by the 4th article was in fact given.

However this may be, it is clear that the Governors of California did not assume to grant the islands on the coast without the previous permission of the Supreme Government. Application for such permission was accordingly made, and it was finally communicated to the Departmental authorities in the dispatch of Pesada of July 20, 1838.

When, therefore, the President ordered a grant of an island to be made, which order the Governor obeyed by issuing the title-papers the grant was in strict conformity with the colonization laws.

For that law confided to the Supreme Executive, as has been

observed, the whole subject of colonization within the territories, nor did it impose any limits on the exercise of his discretion, except that the colonization was to be conducted according to the principles established by the law.

Those principles were of a general character, and fixed nothing as to the particular agencies or mode to be adopted in conferring the title upon the colonist.

In the case of lands within the ten littoral leagues, the law itself forbade their colonization without the previous approbation of the Supreme Executive power. The general regulations therefore, by which the Supreme Executive authorized the Governors and Juntas of the Departments to grant public lands, were never construed to authorize them to grant the islands on the coast, and as observed by the Supreme Court, the power to make such grants was neither claimed nor exercised by the Departmental authorities prior to the 20th day of July, 1838, when the "previous approbation of the Supreme Executive" required by the law was communicated to them.

That approbation having been thus obtained, the Departmental authorities proceeded to grant; and in so doing acted in precise conformity with the colonization laws.

It had appeared to this Court, that the effect of that dispatch was simply to communicate to the Departmental authorities the assent of the Supreme Executive that the islands should be granted, and thus to bring them within the general regulations which prescribed the mode in which all grants should be made.

Those regulations required the concurrence of the Departmental Assembly to give definitive validity to the grant by the Governor; but inasmuch as the Supreme Court had decided that even without the concurrence the grant was valid, unless the grantee's right had been forfeited by abandonment, it seemed to me that a similar rule should be observed with respect to the grants of islands, which, by the previous assent of the Supreme Executive, had been brought within the general regulations.

This view, however, the Supreme Court decided to be erroneous, and held that the dispatch prescribed a new rule on the subject, and that the general regulations did not apply to it.

The mode of granting indicated in the dispatch of Pesada was therefore, to be strictly followed, and inasmuch as the Depart mental Assembly had not concurred, the grant to Osio wa adjudged to be void.

But the reversal of the decision of the District Court on this point, in no way shows that the Supreme Court did not consider grants of islands, when made in pursuance of either the general or special regulations of the Executive, as not made under the colonization law.

On the contrary, it appears to me manifest, that neither in the case of Osio, nor in that of Castillero, do the Supreme Court base their decision on the idea that grants of islands were not within the colonization law of 1824; but that they reject the first claim, because in their opinion the grant was not made in the manner prescribed by the Executive, to whom that law committed the whole power over the subject, and they confirm the second claim because the Executive instructions were followed. It is explicitly stated in the opinion, "that it is immaterial whether or not the power to grant the islands on the coast was vested in the Governor," (*i. e.* by the General Executive regulations of 1828), for the effect of the dispatch "was to repeal the previous regulations on the subject, and to substitute a new one in their place."

As this power of making regulations, with respect to colonization in the territories, was conferred, in terms, on the Supreme Executive, by the Colonization law, and was precisely that which it exercised when the General Executive regulations of 1828 were framed, I confess myself unable to perceive how a grant of an island on the coast, made in obedience to Executive instructions, was not, in every respect, a grant under the Colonization laws, nor can I discover any foundation for the distinction attempted to be drawn between the case at bar and that of the island of Santa Cruz. The lands, in both cases, were open to grant under the general law; and even, if the granting of the islands on the coast to individuals be considered to be embraced within the provisions of the 4th article, and that grants of lands within the littoral leagues were not, the only distinction between

the cases would be, that in one the previous assent of the Executive was necessary, while in the other it was not. Each, when regularly granted, must be held to have been granted under the colonization laws. When, therefore, in the Santa Cruz Island case, the Supreme Court held that the dispatch of the Minister, ordering one of the islands to be assigned to Castillero, "operated to adjudicate the title," the same construction must be given to the dispatch in this case, which states that the President has acceded to a petition for two leagues, and orders the Governor to put the petitioner in possession.

As, then, the Lanzas dispatch "operated to adjudicate the title" to the claimant, he must be held to have acquired an inchoate title, which, if founded on such equitable considerations as would have bound the former Government to complete it by issuing the formal title-papers, this Government is equally bound to respect.

Had the claimant been an ordinary colonist, and relying on the action of the Supreme Government on his petition, settled upon and occupied the land, building a house upon and cultivating it, and had the United States found him in the enjoyment of an undisputed possession, it cannot, I think, be doubted that his possession would have been undisturbed and his title confirmed, even though he had neglected to obtain from the Governor the formal grant.

But no such possession was taken in this case, nor was the concession received in California or even known to have been made, until after the subversion of the Mexican authority.

The question therefore arises: Were there any antecedent equitable considerations on which the concession was founded, such as would have bound the conscience of the Mexican Government to perfect it?

That an antecedent consideration, such as the patriotic and public services of the grantee, is one which a Court of Equity cannot disregard, has been expressly decided by the Supreme Court.

In the case of *Frémont* vs. *the United States*, the Court says:

"The grant was not made merely to carry out the policy of

the colonization laws, but in consideration of the previous public and patriotic services of the grantee; and although this cannot be regarded as a money consideration, making the transaction a purchase from the Government, yet it is the acknowledgment of a just and equitable claim, and when the grant was made on that consideration, the title in a Court of Equity ought to be as firm and valid as if it had been purchased with money on the same conditions." 17 How. 558.

If, then, antecedent considerations of this nature are to be looked to, in determining whether the former Government was under any equitable obligation to perfect the title of the claimant, it is perhaps not easy to imagine a case where the merits of the petitioner and the consideration rendered by him for a small tract of land in a remote Department could be greater.

The immense value of the discovery he had made to the great mining interests of Mexico, need not be dwelt upon. Our own experience in California enables us at once to appreciate how indispensable is an ample and cheap supply of quicksilver to the development of mines of the precious metals. But to Mexico the discovery was, as justly observed by one of the counsel for the claimants, "the unsealing of a hidden fountain of wealth, as precious to her as the rains and dews and living streams are to the nations that live by tillage."

For years it had been the policy of Mexico to stimulate explorations for and to encourage the working of quicksilver mines. By the laws of February 20, 1822, and 7th October, 1823, which imposed duties on gold and silver, quicksilver was expressly exempted from contribution.

In 1842, the Junta de Fomento was established, and empowered "to fix the mode in which the working of quicksilver mines was to be supplied, rewarded, stimulated and protected."

By the decree of May 24, 1843, rewards of $35,000, and of $5 per quintal, were promised to successful miners; and by the decrees of July 5th and September 25th of the same year, the Junta was empowered to work, to supply and protect quicksilver mines, and to cause researches for them to be made throughout the Republic.

When, therefore, Castillero announced the discovery of a mine surpassing in richness that of Almaden in Spain, upon which Mexico had so long been dependent, and desired a grant of two leagues in a Department where land was commonly distributed gratuitously in tracts five times as large, he had equitable claims upon the Government far surpassing "the public and patriotic services of Alvarado," which the Supreme Court declares to have been an equitable consideration, as strong as if the grant had been purchased with money.

Compared with the service rendered and about to be rendered to the Mexican nation by Castillero, the consideration on which the ordinary colonization grants were founded was insignificant; for that consideration merely consisted in building a house, cultivating a few acres of an immense tract, and suffering wild cattle to roam at will over the remainder.

The fact that he was working the mine showed that Castillero had already effected a settlement upon the land, and its further development insured an accession to the population of the country far greater than could have been obtained by any other disposition of the public domain.

The purpose for which he sought the land, apprised the Government that it was of a kind not usually fit for cultivation, for it was required to supply wood for his burnings. In thus assisting his enterprise, the nation had as great an interest as Castillero himself, for it was the attainment of an object to which their attention, their efforts, and no inconsiderable portion of their revenues had long been devoted.

It has appeared to me that all these circumstances constitute an equitable consideration for the inchoate title or concession obtained by Castillero, and that they were sufficient to create an equitable obligation on the former Government, and therefore, on this, to complete and make good the inceptive rights he had acquired.

It is urged by the counsel for the United States, that even if the Castillo Lanzas dispatch be considered a grant, it nevertheless is void, because no possession of the land was given before the 7th of July, 1846, when the Mexican authority in California was

subverted, and the United States acquired the land by the adverse title of conquest.

It is not denied that, as maintained in the brief of the counsel for the United States, in questions of prize or no prize, the liability of the property captured to condemnation depends upon the fact whether the possession and actual control of it have passed from the hands of the enemy to those of a neutral.

Nor is it questioned that, where the territory is ceded by one Sovereign to another, the nationality of the inhabitants of the ceded territory is not changed until the stipulations of the treaty are executed by a formal delivery given, and by possession taken.

It is also admitted that, by the Roman law, and by most systems of jurisprudence, the property in a thing cannot be transferred without a delivery of the possession of the thing, either actual, or feigned and constructive; and that ordinarily, he who first obtains possession shall hold the thing even as against a prior purchaser, to whom it has not been delivered. In the transfer of land the same principle prevailed at the common law, and a symbolical delivery of the land, or livery of seizin, was indispensable to render a feoffment operative.

This, however, is now unnecessary in conveyances under the Statute of Uses.

In the grants made by the Governors of California, we accordingly find that "the judicial delivery of possession by the corresponding Judge" was always contemplated. This proceeding would seem to have been designed for a double purpose: 1st. To complete the transfer of the property, by a formal delivery or tradition of the thing, thus adding the *jus in re* to the *jus ad rem;* and, 2d. To designate and sever from the public domain the tract granted by measuring its extent and establishing its boundaries.

Whether, if the boundaries are distinctly designated in the grant, the judicial delivery of possession was in strictness necessary to complete the right of property in the grantee, may be doubted; for at common law the King's grant was held to im

port livery of seizin, and the same principle is said to prevail at civil law.

But whether technically necessary or not, it is settled by the decisions of the Supreme Court, that the want of a judicial delivery of possession is no obstacle to the confirmation of a grant of lands in California.

The occupation and settlement which, in the Louisiana and Florida cases, were considered to constitute the true grounds of the claimant's equity, were required by the Supreme Court to be shown, not because the technical rule required a formal delivery of possession to complete the transfer of the right of property, but, because the petitioner, by occupying and cultivating his land under an inchoate title, and an implied promise of a grant, had rendered to the former Government a consideration which bound its conscience and that of its successors to perfect the title.

The question then, in this and other cases, is not whether a formal and technical delivery of possession has been made, but whether a consideration has been given for the grant, either antecedent by public services, the payment of money and the like, or subsequent, by occupation, settlement, &c., which in equity required the former Government to convert the inchoate title actually obtained into a perfect title. If, at the acquisition of the country, the conscience of the former Government was bound by this obligation it is equally binding upon us; and the claimant, whether a resident or a foreign Mexican, has a right of property which the United States have agreed by the treaty to respect.

Whether the consideration rendered, and the equitable claims on the bounty of the Mexican Government possessed by Castillero, are sufficient to create such an obligation, is a question which, perhaps, depends rather on the spirit in which his claims are looked upon, than upon any definite rule of law. It has appeared to me, as before stated, that the consideration rendered by him to the Mexican Government did not merely constitute a claim upon its bounty; but that when he had obtained the assent of the Supreme authority to a grant of a specific tract

of land, when orders had been issued to make him a grant and to put him in possession, the execution of which was prevented solely by the outbreak of war, the inchoate title so obtained ought to be respected by the United States.

But if the fact of possession and occupation be insisted on as indispensable, it is to be remembered that the land solicited and ordered to be granted to Castillero, was two leagues "on the land of his mining possession."

It is not disputed that early in December, 1845, he had occupied and worked the mine.

Possession of it had been given to him by the Alcalde, in a loose and informal manner, it is true, but still sufficient to give an official sanction to his occupation, more than six months before the conquest of the country; and from December, 1845, he and his assigns have continued to hold it. As, then, the mine was within the two leagues solicited, and as he had already taken possession of, and was working it, he may, perhaps, be considered, after the order of Lanzas was issued, to have been in possession of the lands referred to in that order.

In no cases was any other possession taken by the California rancheros of the large tracts—sometimes eleven square leagues in extent—granted to them, than by building a rude house of abode, cultivating a small portion of the land, and stocking the remainder with a greater or less number of wild cattle or horses.

I am aware that in this view of the claimant's equities, I have the misfortune to differ from the Circuit Judge.

But on the best consideration I have been able to give to the subject, it has appeared to me not only warranted by the decisions of the Supreme Court, but in accordance with the dictates of the enlarged, and, so to speak, generous justice, which should animate a great and a conquering nation in dealing with the rights of the vanquished.

But it is said that if Castillero obtained from the Supreme Government a grant of two leagues on his mining possession, it proves one of two propositions,—either that he was guilty of a gross fraud in suppressing the fact, that such a grant would include private land, or that the Supreme Government committed

a violation of law equally gross, in attempting to grant the lands of private individuals.

Had the title set up been a formal and absolute grant of two leagues, to be measured in every direction from the mouth of the mine, the observation would have possessed much force. But such is not the import of the Lanzas dispatch; on the contrary, it directs the Governor to put the petitioner in possession of the land solicited, "in conformity with the laws and dispositions on colonization," a direction which rendered it certain that, in the location of the grant, private rights would be respected. Had the Supreme Government known that a tract of two leagues, measured in every direction from the mouth of the mine, would include private land, the precautions used in framing the order to the Governor would have sufficed for the protection of the owner; and the dispatch is, in effect, but the expression of the President's assent to a grant of two leagues on land of the petitioner's mining possession, and an order to the Governor to execute the grant; provided, and so far as it could be done, without injury to third persons.

It cannot, therefore, be inferred from this dispatch, either that Castillero practiced a fraud on the Government, or that the latter committed, or intended to commit, a violation of any private rights whatever.

The last objection to the validity of the Lanzas dispatch which I shall notice, is that contained in the seventh division of the printed argument filed by the counsel for the United States.

The same point had been raised and fully considered by the Court in the case of *Palmer* vs. *The United States*. As the decisions of this Court have not been reported, it has been thought most convenient to append that opinion to this, adding to it such further observations as may seem appropriate:

"Before proceeding to an examination of the merits of this case, a general objection to the validity of the grant must be considered. The grant purports to have been executed on the 25th of June, 1856, subsequently to the declaration of war between the United States and Mexico.

It is contended, on the part of the United States, that on general principles of public law, grants made *flagrante bello* when conquest has been set on foot, and actual occupation is imminent and inevitable, have no validity against the subsequent conqueror. The question has not heretofore been presented to this Court. It has been discussed with much ingenuity and ability.

It is urged that in the conduct of war, and the determination of its objects, the political department is supreme; and that the judiciary are bound by the view taken by the political branch of the Government; that, although Congress has alone power to declare war, to the Executive is given the right of shaping it to its ends, or of declaring its objects.

To ascertain its objects, resort must, therefore, be had to Executive acts, and as the Executive acts in this case unequivocally indicate that a principal object of the war was to acquire California, that acquisition was thus brought within the scope of the war, and must be so regarded by the Courts.

To this point, the case of *Harcourt* vs. *Gaillard*, (12 Wheat.,) is cited.

Such being the object or scope of the war, it is urged that the intended conquest of California embraced not only the establishment of sovereign rights in the Territory, but also the acquisition of the public property within it.

That the proprietary rights to be acquired by the conquest are as essential, though not as important a part of the fruits of conquest, as the political, the commercial, and other advantages proposed to be obtained, and that no part of these objects of the conquest is to be ignored.

The conquest of California, including the acquisition of the public domain, having been thus shown to have been the object, or brought within the scope of the war, it was urged that any grants of public land made after the conquest was projected, and when it was about to be effected, though before it actually occurred, must be deemed to be in fraud of the rights of the incoming conqueror, and invalid as against him.

The foregoing statement is believed to present the outline of the argument submitted on the part of the United States.

Both the premises and the conclusion must be examined.

If the conquest of California was the object of the war, it must be so considered because that object was avowed by competent authority when war was declared; or because it was made the object of the war, after its commencement, by the political branch of the Government.

It may be admitted that this Government had long regarded California, or the Bay of San Francisco, as an important and desirable acquisition. The instructions of the President to Mr. Slidell indicate the wish of the Executive to obtain it by purchase and cession, as Louisiana and Florida have been acquired.

It by no means follows that the intention to obtain it by force of arms, or conquest, can be attributed to Congress, still less that such was its object or motive in declaring war.

The law by which war was declared, recognizes it as previously existing by the act of Mexico; and it is known that hostilities arose by the invasion by Mexico of a territory claimed by the United States to be within their limits. Such was not, therefore, the object for which war was declared, or its existence recognized —nor could it constitutionally have been.

It is observed by Mr. Chief Justice Taney, in *Fleming* vs. *Page*, (9 How., 614,) "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement, but to enable the General Government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. *A war, therefore, declared* by Congress, can *never be presumed* to be waged for the purpose of conquest or the acquisition of territory."

As a limitation upon the power of Congress, this distinction may, practically, be unimportant. As every war in which the country may be engaged must be regarded by all branches of the Government, and even by neutrals, as a just war; and as nations can readily cloak a spirit of rapacity and aggression under professions of justice and moderation, it is at all times easy, should our country be actuated by such a spirit, to declare an aggressive war, to be undertaken in self-defense and an in-

tended conquest to be desired only as a compensation for past or security against future injuries.

But the distinction is important when a Court is asked to presume that conquest was the object of the war.

Under our Government, at least, such a presumption cannot be indulged.

The conquest of California being thus shown not to have been the object for which war was declared, we may next inquire whether, by the acts of the Executive under its power to conduct the war, it became such, or was brought within its scope, in the sense in which the phrase was used at the bar?

In his annual message to Congress, in December, 1846, the President distinctly states that the war originated in the attempt of Mexico to re-conquer Texas to the Sabine. After adverting to the considerations which had induced the Executive to interpose no obstacles to the return of Santa Anna, the latter being more favorably disposed to peace than Paredes, who was then at the head of affairs, the President observed: 'The war has not been waged with a view to conquest, but having been commenced by Mexico, it has been carried into the enemy's country, and will be vigorously prosecuted there, with a view to obtain an honorable peace, and thereby secure ample indemnity for the expenses of the war, as well as our much injured citizens, who have large pecuniary demands against Mexico.'

Similar declarations are frequently and emphatically repeated by the President in various communications to Congress, and in the correspondence between the American Commissioner and the Mexican authorities.

The object of the war, therefore, as indicated by executive acts and declarations, was not conquest; or, if conquest, it was that of a safe and honorable peace.

It is true, that after the military occupation of California, and after our arms had been everywhere successful, and perhaps at the commencement of hostilities, the Executive and the nation may have confidently anticipated that by the treaty of peace we would acquire California. As Mexico was known to be impoverished, and distracted by civil dissensions, it was obvious

that the only indemnity she could afford us for the expenses of the war was the cession of a portion of her territory.

The instructions of the Secretary of State to Mr. Trist, show that the extension of the boundaries of the United States over New Mexico and Upper California, for a sum not exceeding $20,000,000, was a condition *sine qua non* of any treaty.

The extraordinary success of our arms, the fact that we already held possession of a great part of the territory of the enemy, and virtually of his capital, our great expenditures of blood and treasure, entitled us to retain a portion, at least, of our conquest as the only indemnity we could obtain. But we were willing to restore a considerable part of our possessions, and to pay for that retained by us a large amount of money.

But such views and intentions on the part of the Executive, as to the condition on which the war should cease, are very different from waging it with a view to conquest. The war cannot, then, in any just sense, be deemed to have been declared by Congress, or conducted by the Executive, with a view to conquest.

The power of the President in the conduct of the war was that of a commander-in-chief of the army and navy. He had authority to direct and control military operations. As part of the treaty-making power, he could determine when and on what conditions a treaty of peace should be made. But he had no power to impress upon the war a purpose different from that with which it was commenced, and which, as Mr. Chief Justice Taney declares, Congress could not constitutionally entertain. 'The law declaring war,' observes the same great authority in the case above cited, 'does not imply the authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by treaty or conquest, and may demand the cessation of territory as the condition of peace, to indemnify its citizens for the injuries they suffered, or to reimburse the Government for the expenses of the war.

'But this can be done only by the treaty-making power, or the legislative authority, and it is not a part of the authority

conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the military and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subjugate it to the sovereignty and authority of the United States But his conquests do not enlarge the boundaries of the United States, nor extend the operations of our institutions and laws beyond the limits before assigned them by the legislative power.'

It is true that in the case in which these observations are made, the point to be determined was, whether enemies' territory, which in the course of hostilities had come into our military possession, became a part of the United States, and subject to our general laws. But they are important to this case as defining the power of the President in war, to be merely that of the military commander-in-chief; that territory can be acquired only by the treaty-making and legislative authority, and, consequently, that the fact that hostilities are by the military authority directed against a particular portion of the enemy's territory, cannot be said to make the acquisition of that territory the object of the war.

It is therefore apparent that the war with Mexico cannot be regarded by the judicial department of this Government as commenced, or conducted, with the object of effecting the conquest of California.

The most that can be said is, that its military occupation was effected as a means of crippling and subduing the enemy, and with the expectation, on the part of the Executive, that we would retain and finally insist upon the cessation of the territory so subjugated by our arms as an indemnity for our injuries and expenses.

The nature and amount of indemnity to be required, the extent of territory to be ceded, depended upon the will of the Senate and the Executive as the treaty-making power, and until that will was expressed in the treaty, the intention to effect the permanent acquisition of all California cannot be attributed to the

political power, any more than a similar intention with regard to those conquests which at the close of the war was restored.

If, then, it were a principle of public law that all alienations of public domain by a sovereign are invalid as against an enemy who has commenced or is prosecuting a war, with the object of conquering the territory within which the property is situated, or who has set on foot expeditions for the purpose, with sufficient power to attain the end, as proved by the event, the facts of this case would hardly admit of its application.

But assuming the facts as contended for by the United States, we proceed to inquire whether such a rule of law exists. The right of Mexico to dispose of her public domain in California before the war is admitted. It is not denied that that right ceased, as against the United States, when the latter effected the conquest of the country, and subverted the Mexican authority.

If it ceased before the actual conquest and displacement of the Mexican authority, it must be because the determination of the United States to effect the conquest, and the making preparation to carry out its determination, gave to the latter some inchoate or inceptive right to the territory subsequently conquered, and the title consummated by the conquest relates back by a kind of fiction to the date of its inception.

We have been unable to discover any trace or intimation of such a doctrine in any writer on the laws of war.

The rights derived from conquest are derived from force alone. They are recognized because there is no one to dispute them, not because they are, in a moral sense, rightful and just. The conquest of an enemy's country, admitted to be his, is not, therefore the assertion of an antecedent right.

It is the assertion of the will and the power to wrest it from him.

Even where a conquest is effected to obtain an indemnity justly due, it is not the assertion of any antecedent right to the particular territory conquered, but only of the general right to a compensation for injury.

The right of the conqueror is, therefore, derived from the conquest alone. It originates in the conquest, not in the intention

to conquer, though coupled with the ability to effect his purpose, nor even in the *right* to conquer as means of obtaining satisfaction for injury.

It is the fact of conquest, not the intention or power to conquer, which clothes him with the rights of a conqueror.

The rights acquired by the conquest are temporary and precarious until the *jus post liminii* is extinguished; and if a reconquest is effected, the rights of the sovereign who has temporarily been displaced revive, and are deemed to have been uninterrupted.

The term 'title by conquest' expresses, therefore, a fact and not a right. Until the fact of conquest occurs, the conqueror can have no rights. To affirm that a title acquired by conquest relates back to a period anterior to the conquest, is almost a contradiction in terms.

Until, then, the conquest is effected, the rights of the existing sovereign remain unimpaired. He can, therefore, dispose of the public property at his discretion, nor can that right be effected by the determination of an enemy to conquer the territory, and by his preparations for the purpose, though the event may demonstrate the conquest to have been practicable.

The case of *Harcourt* vs. *Gaillard* has been cited by the counsel of the United States in support of the doctrine contended for by them.

The distinction between that case and the case at bar is obvious.

In *Harcourt* vs. *Gaillard* the question was as to the validity of a grant by a British Governor of land within a territory claimed to belong to the United States. As our Government had asserted and maintained by arms its title to the disputed tract, the Judicial Department were not at liberty to declare the claim to be wrongful, and to recognize the right of any other Sovereign over the territory in question.

The title of the United States was in no sense acquired by conquest, Her title was antecedent to the war—it was merely maintained by arms and recognized by the treaty of peace.

The question presented was, in the language of the Court,

'one of disputed boundaries, within which the power that succeeds in war is not obliged to recognize as valid any acts of ownership exercised by his adversary.'

Had the claim been that of conquest alone, the case would have presented, says the Court, more difficulty. 'That ground would admit the original right of the Governor of Florida to grant, and if so, his right to grant *might* have continued until the treaty of peace, and the grant to Harcourt might, in that case, have had extended to it the principles of public law which are applicable to territories acquired by conquest, whereas the right set up by South Carolina and Georgia denies all power in the grantor over the soil.'

The distinction is made still more apparent in a subsequent part of the opinion of the Court: 'War is a suit prosecuted by the sword; *and where the question* to be decided is one of *original claim to territory*, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations. It is *not necessary* here to consider the *rights* of the *conqueror in case of actual conquest.*' (P. 528.)

The latter is precisely the question to be considered in the case at bar.

The argument of the counsel for the United States can, therefore, derive no support from the case referred to.

It is proper, however, to observe that the case of *Harcourt* vs. *Gaillard*, was not cited by the counsel as directly in point. It was thought to establish that all grants of territory brought within the scope of the war are invalid; that the case of disputed boundaries presents one illustration of the general principle, while the case at bar furnishes another.

It has seemed to me, however, that the principle of that decision relates exclusively to the case of disputed boundaries, and that the distinction is clearly drawn between that case and one like the present; that between them the obvious difference exists that the former is a case of 'original claim to territory,' while the other is 'one of actual conquest.'

It is said, on the part of the United States, that if a belligerent can, after a declaration of war, grant any portion of his property

he can grant the whole, and thus might, by granting himself away escape responsibility. The case supposed is an extreme one. It can rarely occur that a nation will seek safety by self-destruction.

But in such case the adversary might refuse to recognize such a voluntary suicide as affecting his rights. For the purpose of obtaining satisfaction he might justly treat the nationality sought to be extinguished as still existing. But in all Courts his rights would be enforced against the successor or grantee of the extinguished Sovereign.

The question would then be purely political, for the new Sovereign, whether to carry on the war or accede to the demands of the enemy of his grantor, and for the latter whether to prosecute the war against the new Sovereign. Little aid, however, can be derived from the consideration of such extreme and improbable cases.

It is further urged, that the doctrine contended for on behalf of the United States is in the prize law.

It may, perhaps, be admitted that a theory of maritime prize formerly obtained, which assumed that a belligerent has a vested right by the declaration of war in all sea-borne private property of the other belligerent; that no such property can be the subject of lawful sale; that all contracts of sale touching belligerent property of any sort, though valid on land, are invalidated by the mere fact of such property being embarked on the ocean, and that if transferred to a neutral after the declaration of war it is a lawful prize to the other belligerent.

Such is not now the received law of nations. It is now admitted that the *bona fide* sale of the ships of belligerents to neutrals in time of war is lawful and valid unless made *in transitu.*

In the Johanna Emilia, 29 Eng. L. & Eq. R., p. 562, Dr. Lushington says: 'It is not denied that it is competent for neutrals to purchase the property of enemies in another country, whether consisting of ships or anything else. *They have a perfect right to do so, and no belligerent right can override it.*'

Such is the doctrine maintained by our Government. See opinion of Mr. Attorney-General Cushing, October 8, 1855.

If a sale to a neutral of a ship *in transitu* is held invalid as against a belligerent, it is not by reason of any inchoate right or lien acquired by the latter by the mere declaration of war, or because the right of the enemy to dispose of his property is invalidated by the declaration of war, but because a sale of a ship *in transitu* is taken as proof of collusion and fraud, and as showing that no absolute transfer has, in fact, been made. The soundness of even this rule is doubted by the Attorney-General in the opinion referred to.

A sale of a ship not *in transitu* by a belligerent to a neutral is valid as against a subsequent captor, no matter how imminent the danger of capture would have been had she remained enemy's property, and no matter what may be the number of hostile fleets fitted out to cruise against her and similar property of the belligerent.

It appears, then, that the law of nations, with regard to prize of war, does not recognize the principle contended for.

It is urged, however, that this principle lies at the foundation of the doctrine of *post liminii.*

It is argued that a state of war implies the reciprocal denial, by each belligerent, of all rights on the other.

That each relies upon force alone—force to retain or force to take.

They are thus in *æquali jure.*

The principle, therefore, by which, on a reconquest, the original title revives, and is deemed to have been uninterrupted, is founded on the presumption that the displaced Sovereign intended a reconquest when he was displaced, and his title on a reconquest relates back to the time when he is presumed to have formed such intention. If, then, (it is argued,) the title by reconquest relates back to the time of the formation of the intention to reconquer, the title by conquest must relate back to a similar period; for a state of war implies the negation of all antecedent right on either side. The only difference between the cases being, that in the case of a reconquest, the intention to

reconquer is presumed until the *jus post liminii* is extinguished, while in the case of conquest that intention must be shown by the political acts and declarations of the conqueror.

The argument is ingenious, but the premises are, I think, erroneous.

It is assumed that a *new* title is acquired by a Sovereign who recovers territories from which he has temporarily been driven.

On the contrary, he holds it by his original title, which could only have been displaced by a permanent conquest. But the fact that he recovers the territory, proves that what seemed a conquest was but a temporary dispossession. The invader, therefore, acquired no rights, nor did the original sovereign lose any. He continues to rule, not by a newly-acquired title which relates back to any former period, but by his ancient title, which, in contemplation of law, has never been divested.

Nor is it true that war is the reciprocal denial of all rights by the belligerents, with respect to the territories of either.

A conqueror does not deny that the territory seized was, at the time of the conquest, the territory of his enemy, any more than the attaching creditor denies the property attached to be that of his debtor.

On the contrary, he asserts it to be his. He seizes it as the property of his enemy, and because it is his. He asserts no antecedent title in himself. He declares, not that the territory was his, but that he will make it his by conquest.

The title or right acquired by a conquest is not the same as that of the original possessor.

It is temporary and precarious, and ceases the moment the conqueror is expelled. If, indeed, a title by conquest can be said ever to have existed when the event has proved that the attempted conquest could not be maintained.

The title of the original owner is wholly unaffected by the temporary dispossession; and even during his dispossession, it is treated as valid and subsisting, until the *jus post liminii* has been extinguished.

The extinction of the *post liminii* is necessary to ripen the

temporary and merely possessary right of the conqueror into such an ownership of the territory as neutrals can recognize.

If these views be correct, the case of a reconquest does not present the instance supposed of a title relating back to the period of the formation of the intention to reconquer.

But the further discussion of this subject would require more time and space than can be devoted to it.

It might, I think, be demonstrated, that a rule which supposes all rights of a Sovereign, with respect to territory subsequently conquered, to cease as against the conqueror, *not* when war is declared, but when the war is prosecuted with the object of conquest, when expeditions are fitted out for the purpose, and when the conquest is 'imminent and inevitable,' is not susceptible of practical application as a rule of international law.

That those rights must continue until the date of actual conquest, or of the treaty of cession, or else must cease at the declaration of war, and that an attempt to estimate the 'imminency' of the conquest at any intermediate period, or to try the validity of the exercise of sovereign rights, by calculating the chances of war at a particular moment, would be impracticable and illusory.

On the whole, I am of opinion that the right of Mexico to grant her public domain in California, continued until the conquest of the country by the United States.

It is further urged, on the part of the United States, that grants made after the 13th May are not protected by the treaty of peace, because such was not the intention of the parties.

That the Mexican Commissioners who negotiated the peace, and who represented the claimants as well as the Mexican Government, solemnly, and after special inquiry, declared that none such existed; and that the treaty was negotiated on the faith of this declaration.

It is admitted that such a declaration was made, and embodied in the *project* of the treaty submitted to the Senate.

Had this declaration been contained in the treaty as adopted and ratified, it might very possibly have been regarded as a

covenant or stipulation that no such grants should be deemed valid by the United States.

But the clause containing it was struck out by the Senate, not by the general vote which struck out the whole of the 10th article, of which this declaration formed a part, but by a distinct vote upon the question whether this particular clause should stand as a part of the treaty.

The Court cannot assume, therefore, that a treaty was assented to by the United States on the faith of this declaration by Mexico, else why strike it out? It may, not unreasonably, be supposed that the Senate refused to allow the declaration to remain, because they were willing that grants made after the 13th May, if any such there were, should be submitted to the Courts, and rejected or confirmed, as might be just.

But assuming that the treaty was concluded on the faith of this declaration, the rights of an individual to his property cannot be affected by it.

The stipulation in the treaty by which the property of the inhabitants of the ceded territory was secured, conveyed to them no additional rights. 'An Article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and never refused.' 12 Wheat., 586.

'When such an article is submitted to the Courts, the inquiry is, whether the land in controversy was the property of the claimant *before the treaty.*' *United States* vs. *Arredondo,* (6 Pet., 712.)

If, then, the land in controversy was the private property of the claimant when the country was acquired, it must have remained such, though no treaty had been made. The United States do not claim to have acquired the ownership of any other property than the public property of the enemy, nor could they justly have demanded that Mexico should assent by the treaty to the confiscation of any property the right to which was vested in private individuals.

If, then, the United States have been wilfully or accidentally deceived, as to the amount of property held in private ownership

in the ceded territory, they may have a right to demand a return of some portion of the pecuniary equivalent paid by them.

The fraud or mistake of the Mexican Commissioners can have no effect upon a private right held sacred by the laws and usages of all civilized nations, which was not derived from the treaty, and which, had it been known to exist, the United States would have been bound to respect.

These observations are made with reference to the general proposition maintained at the bar, viz., that the declaration by Mexico that no grants had been made subsequent to May 18, 1846, invalidated all such grants to the same extent as if a stipulation to that effect had been embodied in the treaty."

In the brief filed in the case at bar, the Court is invited to review the grounds of the foregoing opinion; and the question is discussed by the counsel of the United States with characteristic ingenuity and ability.

The authority chiefly relied on in support of the position taken by the counsel for the United States, is Bynkershoek.

"We make war," says the author, "because we think that our enemy, by the injury he has done us, has merited the destruction of himself and all his adherents; as this is the object of our warfare, it is immaterial what means we embrace to accomplish it." * * * "A nation which has injured another, is considered, with everything that belongs to it, as confiscated to the nation that has received the injury. To carry that confiscation into effect, may certainly be the object of the war, if the injured nation thinks proper."

The doctrine here maintained, that in war, poison and every species of fraud may rightfully be used, has received the general condemnatian of mankind. It may be the censure on Bynkershoek is not wholly deserved, inasmuch as he expresses no approval of those practices, but differs from other writers mainly in distinguishing between the absolute rights of war and those voluntary relinquishments of them which are dictated by humanity and generosity.

But if it be admitted that humanity, Christianity, and the usages and rules observed by all civilized nations (which constitute public law), forbid even in war the use of certain means, the discussion whether such rights abstractly exist, would seem to be a disputation savoring rather of the subtlety of the schools than of that practical sense which seeks to discover and establish the actual rules by which nations in a state of war are governed.

That the rights of war, as deduced by Bynkershoek, from a consideration of its abstract nature, are mitigated by the laws of war as established by the general consent of nations, with respect to the effects of conquest, as well as to the mode of warfare, is proved by the general recognition of the principle that, on the conquest of an enemy's territory, private rights of property are to be protected.

But if "a nation which has injured another is to be considered as confiscated, with all that belongs to it, to the nation that has received the injury," this confiscation must extend to private as well as public property.

A declaration of war undoubtedly involves the assertion of the right to measure and forcibly to exact an indemnity for the wrong which has occasioned the war.

To seize, to conquer, or to destroy an enemy's goods, his territory or his armed adherents, are but the means of exacting this indemnity.

As a matter of theoretical speculation, we may consider the seizure, the conquest, or the destroying, as done by virtue of a previous fictitious or hypothetical confiscation of property, or forfeiture of life, incurred at the date of the declaration of war. But the necessity of such a theory is not very apparent. For the right to subdue the enemy being admitted, as a means of obtaining an indemnity for previous wrongs, the supposed constructive confiscation can add nothing to the rightfulness of those acts. It is for this reason said, in the opinion above cited, that "the conquest of an enemy's country, admitted to be his, is not the assertion of an antecedent right. It is the assertion of the will and power to wrest it from him." On which the counsel for the United States observes: "Then all governments are high

waymen! Forcibly to take without antecedent right is a very good definition of robbery."

The inference is not just. Conquest is, undoubtedly, the assertion of a right, but it is the right to conquer which results from a state of war.

It is not the assertion of a previous *right or title* to the territories conquered.

Whether in so doing the belligerent is acting like a highwayman, depends upon the moral justification for the war, an inquiry into which neither neutrals nor the Courts of the belligerent can enter.

The hypothesis of an antecedent confiscation, to enforce which the seizure is effected, in no way affects the question. The moral justification of the supposed confiscation has still to be considered—in other words, the justice and rightfulness of the war.

But whatever be the reasonableness or necessity of supposing this theoretic confiscation by belligerents, of everything belonging to the enemy, it is manifest that by the laws of nations the confiscation is waived where territory is conquered, so far as respects private property; and especially where the conqueror, by the terms of the treaty of cession, has bound himself to respect all rights of private property existing at the date of the conquest.

To repudiate that obligation with respect to any property held in private ownership on the ground that, though private property when the conquest was effected, it was public property ten or twenty or thirty years before, when the war commenced, and that a writer on public law has said, that the declaration of war is a confiscation of all the property of the enemy, and that the conquest was merely carrying into effect the confiscation, would seem an attempt to justify the breach of a plain and positive obligation, which needs but to be stated to be condemned.

The obvious and natural construction of the treaty is, I think, manifestly the true one, viz., that all private property *bona fide* acquired, and held as such by a legal or equitable title obtained under the former Government, is to be respected by the bellige-

rent, to whom by conquest and treaty the rights of sovereignty have been transferred.

I do not think it necessary further to discuss this question. It is enough to say that I have attentively considered all that is urged by way of argument or illustration in the brief filed by the counsel for the United States. I have found nothing to which the answer did not appear to me easy, or which has shaken my confidence in the justness of the views previously entertained by the Court.

The question might well have been dismissed without argument; for we have an authoritative decision of the Supreme Court on the point. In the case of *The United States* vs. *Pico*, (23 How. R. 826,) the Court says: "In the Act of Congress of 1851, and the decisions of this Court that day (viz., July 7th, 1846, the date of the capture of Monterey and constructively, of the conquest of California,) is referred to as the epoch at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, ceased."

As, however, the point then before the Court was the determination of the precise date of subversion of the former Government, and to decide upon the validity of acts done under Mexican authority *after* that event—while the validity of acts done previous to it was not questioned, nor does the point raised in this case appear to have been presented to the Court—I have thought it not improper to examine at some length the acute and ingenious argument submitted by the counsel for the United States.

I have given to this case much and anxious consideration. The preparation of this opinion has required more labor than even its great length would indicate.

Voluminous as it is, I am nevertheless aware that it is in many respects incomplete.

To have treated at length every point in the case would have extended it far beyond all reasonable limits.

I cannot conclude my labors on this most important case, without acknowledging the great assistance which the Court

has derived from the very able and eminent counsel engaged in it.

Their indefatigable and exhaustive industry has presented to the Court every argument, authority and illustration which profound and patient study, not only of the American and English, but of the Mexican and Spanish laws, could suggest; together with every view of the complicated facts in the case, and of their relations to each other, which could assist the Court in its study of the mass of depositions which have been taken.

To the Court has been left merely the duty of considering the suggestions, and collecting and combining the abundant materials contained in the briefs of counsel.

On the whole case my opinion is:

That the claimants are entitled to seven pertenencias, to be measured in the manner, of the form, and of the dimensions prescribed in the Ordenanzas de Mineria of 1783.

And, also, that they are entitled to two square leagues of land, to be located on the land of their mining possession, but in such a way as not to include any land granted in private ownership, by competent authority, previously to July 7th 1846."

CALAIS STEAMBOAT CO., *vs.* SCUDDER, ADM'R OF VAN PELT.

1 A person residing in California, employed an agent to contract for, and superintend the building of a ship at New York. The agent was furnished with funds for the purpose, and specially directed by the principal to give himself out as the true owner, and to conceal the interest of the principal. Accordingly the agent made all contracts in his own name, and had the vessel registered as his own property. After she was finished he sold her, and put the price in his pocket:— *Held*, That the principal's right in the vessel was gone, unless he could prove that the vendee had notice of his right before payment of the purchase money.

2. As between the principal and agent themselves, the legal title of the latter could not avail him, except as a lien for his services and money advanced, but the rule is different as respects a third person who has bought in good faith and for a valuable consideration.

3. When a question arises between two innocent parties, which of them shall suffer by the misconduct of another, the loss must fall upon him who has enabled the wrong to be committed, and not on him who had no means of knowing that it was a wrong.

4. If the equitable owner of a thing has permitted another to hold the legal title accompanied with the usual documentary evidence of it, with full possession and with declarations of ownership corresponding to the legal title he cannot set up his equity against a bona fide purchaser, who had no notice of it.

5. Secret instructions from the equitable to the legal owner, which produced no change in the apparent relation of the latter to the thing will not affect the right of the purchaser.

5. The burden of proof rests upon the equitable owner, to show that the purchaser had notice of his rights in due time.

7 Where the purchase has been made for a full price and on fair conditions without special advantage to the vendee, the proofs to impeach it ought to be more full and direct, more unequivocal and certain than would be required in the case of a hard or unequal bargain.

Calais Steamboat Company vs. *Van Pelt's Administrator.*

Appeal from the Circuit Court of the United States for the District of Maine.

Mr Curtis and *Mr. Hutchins* of Massachusetts, for appellant.

Mr. Shepley, of Maine, for appellee.

Mr. Justice NELSON. This is an appeal from a decree of the Circuit Court of the United States, for the District of Maine.

The bill was filed in the Court below by Scudder, the administrator of John Van Pelt, deceased, against the Steamboat Company, claiming title to thirteen-twentieths of the Steamer Adelaide, as belonging to the estate of his intestate, and a consequence of this interest to the complainant, an account of her earnings, &c.

The respondent set up, by way of defense, title to the whole of the steamer as bona fide purchasers and for full value from one William W. Vanderbilt, in the city of New York.

The case discloses that John Van Pelt, a resident of California, in the spring of 1853, employed Vanderbilt, an engineer and constructor of steamers, to visit the city of New York and there enter into contracts, and superintend the construction of the steamer in question, he, Van Pelt, furnishing the necessary means for the purpose. The contracts were to be made in the name of Vanderbilt, the builders' certificate to be taken and the enrolment, at the custom-house, made in his name as owner. This instruction was given by Van Pelt to Vanderbilt for the avowed purpose of concealing his own name in the construction of the vessel, as, for reasons not material to state, he did not wish it to be known in the city of New York, or in California, that he was interested in her. He was very specific and urgent on this point; for, in one of his last letters to Vanderbilt, written at his request, 13th September, 1853, (he died on the 29th,) he says, "You are not to know that he (Van Pelt) has any interest in the boat; and, that you must be more particular in talking and writing about her and her destination."

The boat was built in New York in pursuance of this authority and these instructions. The contracts were entered

into for the hull and engines in July, 1853; for joiner work painting, &c., at a later date. All made in the name of Vanderbilt. She was finished in September, 1854. In the latter part of August of the same year, two agents of the respondents visited the city of New York for the purpose of buying a steamboat to be put on their line of steamers in the place of one disabled, and saw or had seen the steamer in question advertised in the daily city papers for sale. And, on application to Vanderbilt, and after examination of the vessel and the usual negotiations as to price, on the third of August the purchase was made for the sum of $88,000—$5,000 paid down, $15,000 28d August, and the balance 9th September. Vanderbilt, after having procured the usual builder's certificate, to which he was entitled as contractor for the building of the vessel, had her enrolled in his own name as owner; and then, on the 9th September, executed a bill of sale to the purchasers, under whom the respondents claim title.

Upon this simple statement of the case, it is not to be doubted but that the legal title to this vessel passed to the purchasers; for, although as between Vanderbilt and Van Pelt, his principal, or the estate of Van Pelt, the legal title could not avail, beyond a lien for his services or for any advances; yet, as it respects third persons, who have bought in good faith and for a valuable consideration, the rule is different. The question then arises between two innocent parties, and the equity of the case turns against the party who has enabled his agent or any other person to hold himself forth to the world as having not only possession, but the usual documentary evidence of property in the article. 8 B. & Cr., 38; 4 D. & A., S. C; 8 Cow., 288.

The case furnishes a very strong illustration of this principle. All the indicia of property in this vessel in Vanderbilt existed from no fault of his, for he was clothed with it by the express authority of the principal. Van Pelt, therefore, took upon himself knowingly the responsibility of vesting the property of the vessel in Vanderbilt, as he must have known that it was in his power to deal with it as owner. Besides, he was extensively engaged in the business of steamboats in the waters of California.

and doubtless understood, in point of fact, the responsibility he was assuming. Van Pelt died in September, 1853, while this vessel was under contract for construction. The event, however, did not interfere with it, as his legal representatives continued the arrangement the same after as before—furnishing the necessary funds, and carrying on the work till the vessel was finished. They took the place of Van Pelt.

In order to weaken this view of the case, it is said that Van Pelt, before his death, changed the agency of Vanderbilt by the appointment of one D. P. Vail. If this were conceded, unless it had the effect to change the apparent ownership of the vessel in Vanderbilt, the circumstances would be immaterial. No secret arrangements between the parties could affect third persons But there was no change in the instructions to Vanderbilt of any importance in the case. The authority of Vail was confined to the furnishing of the vessel after she was finished, and to the taking charge of her as Captain in carrying her to California. The funds furnished by the owners passed through his hands to Vanderbilt. In one of the last letters written by Van Pelt, 1st September, 1853, to Vanderbilt, before his death, he says—speaking of the vessel—"I wish the bill of sale to be made for D. P. Vail, ten-twentieths; R. Chenery, four-twentieths; R. M. Jessup, three-twentieths; W. W. Vanderbilt, two-twentieths; and Frank Johnson, one-twentieth."

These instructions to Vanderbilt related to his disposition of the vessel after her completion, the names and shares representing the owners, and their interest. The ten-twentieths in Vail's name represented the interest of Van Pelt, and was placed there to conceal his interest agreeably to his original purpose.

These instructions, whatever may have been their effect upon the parties concerned, had none as it respected the apparent relation of Vanderbilt to the vessel. He remained in possession of her and of all the documentary evidence of property, and was thus held out to the world as the legal owner. Indeed, no change was contemplated in this letter till the boat was finished. Vanderbilt then was to give a bill of sale to the persons named, Van Pelt's interest still to be concealed. We lay out of the case,

therefore, all the evidence in respect to the connection of Vail with the construction of the vessel, as in no way affecting the ostensible ownership of her by Vanderbilt.

It is insisted, however, that, assuming the respondents obtained the legal title of the vessel by the purchase and bill of sale of Vanderbilt, still the title was defective, inasmuch as they are chargeable with notice of the equitable interest of the estate of Van Pelt. This, in our view of the case, is the only serious question in it.

It is admitted that the respondents paid the full value of the vessel at the time of the purchase—$88,000. They had no motive, therefore, to make the purchase of a vessel of doubtful or defective title. So far as regards the contract of purchase itself, its terms and conditions, there is nothing inconsistent with the most entire good faith. If the vessel had been purchased under her value, or the mode of payment had been prejudicial to the vendor, or any special gain had been achieved by the purchasers, the Court would necessarily approach this question of notice with very different impressions from those proper in this case. Down to this point, the evidence of good faith is undeniable, and must be overcome by the proofs of the adverse party. We go one step further; with such evidence of good faith from the terms and conditions of the contract itself, the proofs to overcome it should be more full and direct, more unequivocal and certain than in the case of a like impeachment of a hard and unequal bargain.

Before we enter upon the proofs on this point, it may be well to ascertain, with some degree of exactness, the precise practical question involved in this charge of notice.

The estate of Van Pelt claims thirteen-twentieths of the vessel, on the ground that the funds of Van Pelt in his lifetime, and of his estate since his death, were furnished to the extent of this interest to build the vessel. The claim is for a latent equitable interest resting in the heirs or personal representatives of the intestate. The remaining interests in the vessel are not in question It is admitted the other owners authorized the sale, and have received their share of the purchase money The

case, therefore, is brought down to the single question, are the respondents chargeable with notice of this outstanding equitable interest in the vessel at the time of the purchase?

Our first remark is, that all the parties concerned in or connected with the purchase deny notice, and testify to the good faith of the transaction. Vanderbilt and Vail, who were concerned in the sale, and Deming and Todd in the purchase—four persons, each of unimpeachable characters.

This position is sought to be impaired by a critical examination of the testimony of Vanderbilt and Vail, who were examined on interrogatories, and isolated answers are seized on for the purpose of weakening the general denial, and establishing the fact of notice. We shall not go into the detail, but content ourself by stating that we have very diligently examined all the answers of these witnesses relied on in connection with the whole of their testimony on the subject, and they come to this—that the purchasers were advised there were parties in California who had advanced money towards building the vessel; that she was originally intended for employment in the waters of that State; that this purpose had been changed; and that they wished the boat sold, and that they, Vanderbilt and Vail, were authorized to sell her. Now this taken together furnishes neither notice of the equity of the estate of Van Pelt in the vessel to the purchasers, nor is it sufficient even to put them on inquiry. It must be recollected that the burden of proof rests upon the complainant. Taking the whole statement as true and entitled to belief, there is nothing in it to excite the apprehensions of even a prudent business man; for at the same time the purchasers were advised of advances or interests of persons in California, they were advised they had authorized the sale. One part of this statement was as much entitled to belief as the other. The case falls within the principle stated by Lord Lyndhurst in *Jones* vs. *Smith*, (1 Phillip, Ch. R., 244).

It must be remembered that this was not a purchase under a power of attorney, and hence a necessity to look to the power and see to the authority.

The purchase was from the apparent owner, possessed of all

the indicia of property, and the question is, whether this evidence of ownership is overcome by notice of an outstanding equitable interest in the vessel. The affirmative rests with the party charging notice, and the facts brought home to the knowledge of the purchaser to charge him with notice must be taken together, as the question is, what effect the evidence as a whole should have produced on his mind. Nor should it be forgotten that the persons who had advanced money to Vanderbilt had advanced it for the building of a vessel in his name and as his property.

The same observations are applicable to the testimony of Butler, a witness, who says, there appeared to be a question between the parties regarding the validity of the title to the boat; that Vanderbilt and Vail assured the purchasers that, independent of being builders of the boat, they were duly authorized by all the parties that might have any interest in her in California to sell her on the best terms. This witness does not profess to give the words of the parties, but only the substance of the conversation as he then recollected it.

The testimony of Spencer, who went to New York to become steward on the Adelaide, to the 12th interrogatory, says, "I understood from both Capt. Vanderbilt and Mr. Demming that John Van Pelt was part owner of the Adelaide;" and to the 15th, he answered, "they (Vanderbilt and Demming) both told me that the Adelaide was built to go to California; Captain Vanderbilt said they had entered into a combination out there, and the Adelaide was not needed; that they had boats enough out there to do all the business, and that this was the reason why they sold the Adelaide."

Now, the fact that the boat was built for parties in California, and that they had come to the conclusion she was not needed there, and wished her sold, did not necessarily detract from the right or authority of Vanderbilt to sell, who was invested with the legal title. If she was intended for sale, the presumption would not be an unnatural one that he was thus invested for the very purpose of a sale. As to the testimony of Spencer, that he "understood from both Vanderbilt and Demming that John Van

Pelt was part owner of the Adelaide." This is hardly evidence in a Court of Justice. It is the inference of the witness from conversation, instead of the conversation itself. It is not the evidence of a fact; a charge of perjury could not be predicated upon it if false.

Wood, another witness relied on to prove notice, beside the indefiniteness of his testimony, the conversation occurred nearly four years after the transaction; after also litigation had sprung up concerning the claim of the estate of Van Pelt. The suit in question was then pending against the respondents, and was naturally the subject of conversation and very easy of misap prehension. This witness also seems to have been in frequent communication with one of the parties in the Van Pelt interest. As a specimen of his testimony—"I asked Demming, I think, how the boat came to be sold here, and I think, Demming or Mayhew told me that a person by the name of Van Pelt owned her, who died in California. I don't know that he said Van Pelt owned her, but that owing to Van Pelt's death she was sold here."

This witness also says: "I understood from conversation I had with Demming and Mayhew that they had knowledge of the interest of Van Pelt or of that estate before the boat was purchased." We need not repeat this is not evidence. This is all the testimony on the question of notice that deserves any comment. We have seen that Van Pelt in his lifetime, and his legal representatives since his death, have studiously concealed their interest in this vessel in the city of New York, and for this purpose caused her to be constructed and finished in the name of Vanderbilt; and, after the appointment of another agent, Vail, to take charge of her after completion, the interest was still to be concealed in his name, thereby holding out a third person as the ostensible owner from the beginning of her construction, till the sale took place in August, 1854. And, although we do not say these parties who have thus enabled their agents to impose upon the purchaser should be estopped from setting up their interest as against him, if he purchases with knowledge, yet we think, under such circumstances, it is

the duty of the Court to scrutinize the evidence with more than ordinary attention—the proof of knowledge should be direct and unequivocal. The parties here seeking to prove the knowledge assume a position in contradiction to their past conduct, and are not entitled to the most favorable consideration of the Court. They are endeavoring to charge knowledge of a fact upon third persons or the public, when their interests become concerned, which they had down to the sale industriously concealed.

Some observations have been made upon the circumstances under which the vessel left the port of New York for the East, as tending to impeach the good faith of the purchasers. The proofs on this subject leave no such impression on the mind of the Court. The vessel had been purchased to fill a vacancy on a line of steamboats, and a delay of some ten days had occurred beyond the time fixed for her completion, which reasonably explains any impatience on the part of the purchasers in leaving for the city of Boston. Certainly, the fear of arrest can hardly be inferred from their anxiety, as the vessel was equally exposed to one in the latter city as in the former.

Without pursuing the case further we are satisfied that, upon a full examination of the proofs on the question of notice, they fail to impeach the *bona fides* of the purchasers, and as the legal title passed, the complainant has failed to establish any right to relief; and, we may add, we are not sorry that we have come to a conclusion in favor of the innocent party who has acted upon the evidene of the legal title of the party from whom the purchase was made against the other innocent party, who had not only been instrumental in furnishing this evidence but has industriously concealed his own, and thus turned the equity of the case against him.

The decree below reversed.

Mr. Justice CLIFFORD, dissenting: I cannot concur in the opinion just pronounced; and inasmuch as the case is one of importance to the parties, I think it proper to state the reasons of my dissent. Appellee claims title to thirteen-twentieths of the

steamboat described in the bill of complaint, as administrator of John Van Pelt, late of San Francisco, in the State of California, deceased. He was the complainant in the Court below, and his claim is based, in the bill of complaint, upon the ground that the money to build thirteen-twentieths of the steamer was furnished by his intestate in his lifetime, or was paid out of his estate since his decease, to redeem certain personal property belonging to the estate which had been pledged by the decedent while in full life to furnish credits to construct and complete the steamer. Title to the whole steamer is claimed by the respondents in their answer by virtue of a purchase made by their agent on the 9th day of September, 1854, of one William W. Vanderbilt. John Van Pelt, on the 1st day of May, 1853, employed William W. Vanderbilt to make a draft for a steamer which he proposed to build in the City of New York, to be employed in navigating the waters of California. Vanderbilt made the draft as requested, and Van Pelt about the same time proposed to him that he should proceed to the City of New York as his agent, and there contract for and superintend the building of the steamer. Prior to that time he had been in the employment of Van Pelt as an engineer in navigating steamers on the waters of the former State. Connected as Van Pelt was, with such navigation, he did not desire that it should be publicly known that he was about to build a steamer of the description mentioned to come to California; consequently, it was arranged between him and his agent that the latter should immediately proceed to the City of New York and make the contracts for the contemplated steamer in his own name, and Vanderbilt testifies that he was to enter the steamer, when completed, at the Custom-house in New York as his vessel, unless he was otherwise ordered by his employer. According to the arrangment as then made the steamer, when completed, was to be sent to California and there wholly transferred to the principal, unless the agent should decide to become interested in her to the extent of two-twentieth parts as it was then contemplated he might do. Full proof is exhibited that Van Pelt advanced $20,000 to his agent towards the enterprize before any of the contracts were actually made

for the building of the steamer; $12,000 of that sum was advanced in the month of May, 1853, before the agent sailed for New York, and the balance was duly forwarded to the agent and received by him before any of the payments fell due under the construction contracts. On the 7th day of July, 1853, the agent made the contract with Lupton and McDiarmid to build the hull of the steamer for the sum of $20,000; $5,000 were to be paid when the keel was laid, $5,000 when the vessel was in frame, $5,000 when she was planked and her deck laid, $2,500 when she was launched, and the balance of $2,500 when the carpenter-work was finished. Separate and wholly independent contracts with other parties were made by the agent for the engine, joiner-work, and painting. Payments under all the contracts were to be made by instalments "as the work progressed," and in all, except the one first mentioned, it was expressly stipulated that the work should be done to the satisfaction of Vanderbilt. Van Pelt wrote to him on the 1st day of September, 1853, directing that the steamer, when completed, should be registered as follows, to wit: ten-twentieths in the name of D. P. Vail, four-twentieths in the name of Richard Chenery, three-twentieths in the name of R. M. Jessup, two-twentieths in the name of William W. Vanderbilt, and one-twentieth in the name of Frank Johnson. Other correspondence took place between these parties which shows to a demonstration that Vanderbilt was merely the agent of Van Pelt, in contracting for the building of the steamer, and that the original instructions in respect to the registry of the steamer were wholly superseded. When the enterprize was projected Van Pelt had expected to visit New York before the steamer was completed, but his health failing in September, 1853, he was obliged to abandon that intention, and for that and other reasons determined to make some new arrangement in respect to the steamer. Having come to that determination, he sent for Richard Chenery, who, accordingly visited the decedent at Sonoma where he was then sick, and they made an arrangement in respect to the subject-matter of this controversy. Under that arrangement Chenery for himself and R. M. Jessup, took seven-twentieths of the

steamer, and it was agreed that he should have the entire control of the business. Pursuant to that arrangement Chenery paid to Van Pelt seven-twentieths of the $20,000 which the latter had already advanced to build the steamer, and by pledging property they procured a letter of credit on Page, Bacon & Company for an additional sum of $50,000, to be expended in her completion. They also appointed D. P. Vail as their agent, and sent him to New York to adjust and pay the accounts and close up the concerns growing out of the building of the steamer. He took with him the letter of credit and proceeded to New York, but on the 29th day of the same September John Van Pelt died.

Administration was granted on his estate in California in October, 1853, and when closed, it appeared that there was $70,000 for distribution among his heirs, exclusive of his interest in the steamer now in controversy. Thirteen-twentieth parts of the steamer were built from moneys advanced by John Van Pelt, or procured from credits furnished by him in his lifetime, as fully appears by the accounts adjusted and paid by his administrators, and duly presented and allowed in the Probate Court. $48,194.57 were paid by his administrators to redeem the property pledged to procure the before-mentioned letter of credit, and the whole amount so paid by them was expended in the construction of the steamer. $18,000 had been advanced by Van Pelt in his lifetime, as before explained, and the two sums exceed thirteen-twentieths of the cost of the steamer by more than a thousand dollars. Vail proceeded to New York, pursuant to his appointment as agent of Van Pelt and Chenery, but as all the contracts had been made in the name of Vanderbilt, he continued to superintend the completion of the steamer.

Contractors for the hull agreed to complete the same in four months from the seventh day of July, 1853, and the evidence shows that the hull was launched and delivered to Vanderbilt in December following. She was built in Green Port, and after being delivered, she was taken to New York, and in a few days after her arrival there, the proper contractors commenced to put in her engines. More than $56,000 were expended in her con

struction and equipment, in addition to the sum of $20,000 paid to the builders of the hull. Builders of the hull were paid in full according to the contract, and they delivered the same to Vanderbilt in December, 1853, without reservation or condition.

1. Having received their pay in full, and delivered the vessel without reservation or condition, of course they retained no interest which they could afterwards convey to any one. They built the hull only, and never had any interest, title or claim, in the entire vessel, or in the $56,000 expended for her completion after such delivery. Where an entire vessel is agreed to be built by a contractor, no property vests in the party for whom she is built until she is ready for delivery, and has been accepted or approved by such party. *Mucklow* vs. *Mangles*, (1 Taun., 318); *Stringer* vs. *Murray*, (2 Barn. & Ald., 248); *Merrit* vs. *Johnson*, (7 Johns., 473); *Abbott on Ship*, p. 5.

But that rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent, and payments for her, based upon the progress of the work, are to be made by instalments, as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner by all the well-considered decisions upon the subject. *Woods* vs. *Russel*, (5 Barn. & Ald., 442); *Atkinson* vs. *Bell*, (8 Barn. & Cress., 277); *Clarke* vs. *Spence*, (4 Ad. & Ell., 448); *Laidler* vs. *Burlinson* (2 Mee. & Wels., 602); Chitt. on Con., (10th ed.,) p. 401; *Andrews* vs. *Durant*, (1 Ker., 40). Vanderbilt acquired no title by the delivery of the steamer, for the reason that he furnished no money to pay the contractors, and in accepting the same he acted as the agent of those whose money was invested in the enterprise. He took no written conveyance at that time, and the whole evidence shows that he did not then contemplate any fraud upon the rights of those he represented in accepting the delivery. Builders never had any title, because the work had been performed under the superintendence of the agent, and by the terms of the contract the consideration was to be paid, and was in fact paid by instalments, as the work was done.

2. Suppose it had been otherwise, however, it must still be

conceded, I think, that no title remained in the builders of the hull after the reception of the consideration, and the unconditional delivery of the steamer under the contract. Title, therefore, must have vested in those who furnished the means to build the vessel, unless it be held that it was in abeyance, which no one will assert. Assuming the facts to be so, then it is clear that the case falls within the rule that when an agent acquires property in his own name by the use of the funds of his principal, it thereby becomes the property of the principal by operation of law. *Scott* vs. *Surman*, (Willes R., 400); *Taylor* vs. *Plummer*, (3 Maul & Selw., 574, 578); *Thompson* vs. *Perkins*, (3 Mason, 235); Story on Ag., sec. 231.

None will deny that title to a ship or vessel may be acquired by building or by purchase; and it is equally clear that it may be established, especially when acquired in the former mode, without the exhibition of any bill of sale or other written evidence. Authorities in this country are abundant to show that the title of a vessel may pass by delivery under a parol contract. *Bixby* vs. *Franklin Ins. Co.*, (6 Pick., 86); *U. S.* vs. *Willings* (4 Cran., 55); *Badger* vs. *Bank of Cumberland*, (26 Me., 428); *Windover* vs. *Hogeboom*, (7 Johns., 308); *Vinal* vs. *Barret*, (16 Pick., 401); *Leonard* vs. *Huntington*, (15 Johns., 298); *Thorn* vs. *Hicks*, (7 Cow., 699; Pars. Mer. L., 329); *Stacy* vs. *Graham*, (8 Duer, S. C., 452); *Lord* vs. *Furgerson*, (1 Mason, 317). Thirteen-twentieths of the steamer vested in the estate of John Van Pelt, in December, 1853, when the builders of the hull delivered the same to Vanderbilt.

8. When that delivery was made, Vanderbilt had no muniments of title whatever, and did not commence to procure them until the 7th of April, 1854, and, in the meantime, $56,000, in addition to what had been paid for the hull, had been expended upon the steamer, and the estate of the complainants' intestate paid thirteen-twentieths of that sum to redeem the property, pledged by the intestate in his lifetime, as before explained. Attention to dates is important on this branch of the case, in order to ascertain when and by what means, if at all, Vanderbilt acquired what is called an apparent legal title. Importance

must be attached to the inquiry as to dates, because the opinion of the Court admits in effect that the title in fact, as between the respondents' grantor and the legal representatives of the deceased, was in the estate of the decedent; and it is difficult to see how the admission could have been withheld, as four months intervened after the builders surrendered all pretense of title before any writing of any kind was procured furnishing any color to any such ground of defense. When it is said that Vanderbilt had the apparent legal title, reference is made, I suppose, to the bill of sale from the builders of the hull, to their certificate as master carpenters, and to the enrollment of the steamer at the custom-house. These several papers, it seems, are regarded as constituting what is called an apparent legal title in Vanderbilt; but if they do, it will be seen that they became such by a fraud as base and transparent as was ever perpetrated by a living man upon a dead man's estate. Bear in mind that Vanderbilt was virtually superseded when the new agent was sent to New York to settle the accounts and close the concerns. His subsequent services were rendered as a sub-agent under David P. Vail; but, whether so or not, his agency under his first appointment terminated on the 29th of September, 1853, when John Van Pelt died. He then had no muniments of title, apparent or otherwise, and the whole evidence shows that he never became the agent of the heirs, or legal representatives of Van Pelt's estate. To make up the supposed apparent legal title, his first step was to induce the builders of the hull to give him a bill of sale of the whole steamer. What inducements were held out to them to give the bill of sale does not appear; but it does appear that, on the 7th day of April, 1854—four months after they had delivered the hull without reservation or condition—they gave him a bill of sale of the whole steamer, in consideration of $20,000, as therein expressed with covenants of general warranty applicable to the whole interest and value of the steamer. They generously conveyed not only what they built themselves, but all that was built by others, and warranted the whole to the grantee. Speaking of the sale of a ship, Chancellor Kent says the general rule is that no person can convey who has no title, and the mere fact of

possession by the vendor is not of itself sufficient to give a title. 3 Kent Com., p. 130; *Williams* vs. *Merle*, (11 Wend., 80.) Observe that the hull was unconditionally delivered by the builders four months before the date of this bill of sale, and it is very evident that after such delivery they retained no interest in the hull or any part of the vessel which they could convey to any one; and they never had any pretence of interest in the engine or the other materials added to the steamer between the time of the delivery and the date of their bill of sale. When that bill of sale was given, no builder's certificate had been filed in the custom-house; but on the 22d day of May following, the builders of the hull filed in the proper office a certificate in the usual form, certifying that the steamer had been built by them at Green Port, in 1854, and that William W. Vahderbilt was the owner. Such a certificate has the effect to show that the vessel was built in the United States, and that she is entitled to be registered as such, and it is required to be filed before the vessel can be registered or removed from the district where built to the district where the owner resides. Act Dec. 31, 1792, sec. 4, 1 Stat. at Large, 289.

4. Certificates given by master carpenters as a compliance with the registry acts are required for certain specified purposes, but they are not instruments of conveyance and cannot properly have the effect, or be so construed as to vest any interest in the person holding the same, as the owner of the vessel, beyond what he has by virtue of some other valid, legal title. Unless these two instruments, taken in connection with the attending circumstances, constituted a legal title in the grantor of the respondents, then it is clear that he had none such, because they are all the muniments of title held by him on the 3d day of August, 1854, when he contracted to sell the steamer to Wm. Deming and Wm. Todd, the agents of the respondents who made the purchase. Conveyance of the steamer, however, was not made by him until the 9th day of September following, and on that day she was enrolled at the Custom-house in his name. Doubts had arisen in regard to her title, and the purchasers and seller respectively employed counsel to make the title satisfac-

tory at the custom-house, which resulted in procuring an enrollment Saturday evening just before the custom-house was closed. Written notice in behalf of the legal representatives of John Van Pelt was given to the Collector of New York on the 22d day of June, 1854, informing him that Van Pelt at his death was the owner of thirteen-twentieths of the steamer, and requesting that she might not be registered or enrolled, or any transfer of her entered at the custom-house without notice to them, but it does not affirmatively appear that the agents of the respondents had any knowledge of that paper. Registry acts are to be considered as forms of local or municipal institutions for purposes of public policy. They are imperative only upon voluntary transfers of the parties, and do not in general apply to transfers by act or operation of the law. 3 Kent. Com., 9th ed., 208. Of itself, the registry it is said is not evidence of property unless it be confirmed by some auxiliary circumstances to show that it was made by the authority of the person named in it, who is sought to be charged as owner. Without such proof, Courts of Justice have expressed strong doubts whether it was even *prima facie* evidence of ownership. *U. S.* vs. *Brune*, (2 Wall, jr, p. 264); *Tinkler* vs. *Walpole*, (14 East, 226); *Melver* vs. *Humble*, (16 East, 169); *Fraser* vs. *Hopkins*, (2 Taunt., 5); *Sharp* vs. *United Ins. Co.*, (14 Johns., 381); 1 Greenl. Ev., p. 494. Upon the same ground and for the same reasons it is competent for the real owner who claims as builder to show by parol evidence that his claim is well founded, and that the builder's certificate and registry or enrollment were fraudulently made and issued in the name of another. Such fraudulent acts cannot convey any interest in the vessel, and if not then a claimant whose title has no other foundation cannot convey a good title as against the real owner even to a purchaser without notice, because he cannot convey a title to that which he does not own. *Williams* vs. *Merle*, (11 Wend., 80); *Everett* vs. *Coffin*, (6 Wend., 609); *Prescott* vs. *Deforest*, (16 Johns., 169.)

5. But suppose it to be otherwise, and that the legal title to the steamer was in Vanderbilt at the time he and Vail gave the bill of sale to the agent of the respondent, still the complainant

as it seems to me, is entitled to recover in this suit on the ground that Vanderbilt held the title in trust for the legal representatives of John Van Pelt, and that the agents of the respondent had notice of the defect of title in their grantor. It is admitted that as between the legal representative of Van Pelt and the grantor of the respondents, the title to the steamer was in the former, so that the only question on this branch of the case is that of notice, but it is said that direct and unequivocal proof of notice must be required. Nothing is better settled than the rule that a purchaser with notice of a trust stands in no better situation than the seller, and it is equally well settled that notice to the agent is notice to the principal. Com. Dig. Chan. 4, c. 5; *Maddox* vs. *Maddox*, (1 Ves., Jr., p. 62); *Fulton Bank* vs. *New York and Sharon Canal Co.*, (4 Paige Ch. R., 127); *Bank of Alex.* vs. *Seton*, (1 Pet., 309). Purchasers with notice are bound in all respects as their vendors were, and have no greater right. *Taylor* vs. *Stibbett*, (2 Ves., Jr., p. 437).

6. Until a different rule is established by this Court, I must continue to hold that whatever puts a party upon further inquiry is sufficient notice in equity. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Hill* vs. *Simpson*, (7 Ves., Jr., 170); *Kennedy* vs. *Green*, (3 My. & Keen, 722); (Com. Dig., Chancery, 4, c. 2; *Smith* vs. *Lowe*, (1 Atk., 489, 3 Sug. on V. & P., 10th ed., 471); *Jones* vs. *Smith*, (1 Hare, 43); *Booth* vs. *Barnum*, (9 Conn., 286); *Pitney* vs. *Leonard*, (1 Paige, Ch. R., 461); *Carr* vs. *Hilton*, (1 Cur., C. C., 390). Constructive notice is held sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be effected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Hence, says Judge Duer, in *Pringle* vs. *Phillips*, (5 Sand., S. C. R., 157); he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts that by a proper inquiry

he might have ascertained. *Hawley* vs. *Cramer*, (4 Cow., 717); *Williamson* vs. *Brown*, (20 Law R., 897).

7. Applying these principles to the present case, I am of the opinion that the evidence to show notice is full and complete establishing the fact beyond all reasonable doubt. Respondent's agents, Deming and Todd, were examined as witnesses, and they deny that they heard that any parties in California other than their grantor had any right or interest in the steamer, but the fact is proved to have been otherwise by six or seven witnesses, whose depositions are in the record. Their grantor, Vanderbilt, was examined as a witness, and the respondents asked him whether in the negotiations and interviews he represented himself as acting for any other person than himself, and he stated expressly that he represented himself as acting for himself, David P. Vail, "and the other owners." Responding to another interrogatory of a similar character, he said that he represented himself as acting for himself and parties in California who had advanced him money to build the boat, and as if to make it more emphatic and precise, he also said that he did state that parties in California had advanced him money to build the steamer Adelaide; and what is still more important, he also said that he so stated on board the Adelaide some time in August, 1854, and that they, the California parties, wanted the Adelaide sold to realize their money, as he had no other means of paying them. Communications so direct and specific could not have been misunderstood, and the occasion last referred to undoubtedly was the one when the respondent's agents went on board the steamer to examine her on the day the contract of sale was made. When the last interview took place Vail was out of town, but Vanderbilt says he informed the respondents' agents that Vail represented some parties in California who had advanced money. Some delay occurred in consequence of his absence, but he was sent for and joined in the contract; and Vanderbilt says that he represented to them the position he occupied; that he represented that he was acting as the agent of parties in California who had advanced money for the vessel; and in conclusion, the witness says: "I always told them there

were parties in California who had advanced money for the steamer, but I have no recollection of telling them the names of the parties."

Vail was also examined as a witness by the respondents. He says it was mentioned at the time that he represented owners in California, and that he consented to the sale by authority of instructions from Mr. Chenery to that effect. Deming and Todd, as the witness stated, understood from Vanderbilt and himself that the vessel was built for parties in California, and that the reason she was sold was because the business had changed there so that the boat was not wanted. We told Mr. Deming, says the witness, that we were acting for parties in California, who wished the boat sold; and we did state that the Adelaide was built for parties in California. Both of these witnesses were examined by the respondents, and it is safe to say—there is no ground to suspect them of any partiality for the complainant. Other witnesses were also examined upon the subject, on the one side or the other, whose testimony is equally explicit. Complainant examined Carlos P. Butler, who wrote the original agreement. He says that there appeared to be a question between the purchasers and the sellers in regard to the validity of the title to the boat. Sellers assured purchasers that, independently of being builders of the boat, they were duly authorized by any party or parties that might have an interest in her in California, to dispose of her on the best possible terms. Want of confidence was evidently felt and manifested in what is now denominated the apparent legal title. Assurances were given that the persons proposing to sell had authority to sell from the real owners; but they exhibited no power of attorney to represent absent owners, or to sell the interest of the complainant's intestate, and no inquiries were made upon the subject. Witness says doubts were expressed as to the power of Vail and Vanderbilt to convey a good title, but Mr. Deming said he was perfectly satisfied with their statement. Their statement was, that they had authority independently of being builders of the boat; but no such authority was exhibited and no inquiries made in regard to it

although the witness states that it was spoken of by all that the steamer was built for parties in California.

Answer of respondent denies all such information, but the evidence proves it and falsifies the answer. Defence must rest where it is placed in the pleadings, and cannot now be shifted. Another witness, examined by the complainant, was John W. Marshall, who testifies that while Deming and Vanderbilt were negotiating on board the steamer, the latter said he wanted to see Captain Vail before he could do anything about selling the steamer, as he (Vail) had power to sell the boat; and the witness adds: Deming knew she was built for parties in California, as we talked about it before we came on. Reference should also be made in this connection to the deposition of John Spencer, who testifies that Vanderbilt and Deming both told him that the Adelaide was built to go to California to run on the Sacramento river; and he expressly states that he understood from both of them that John Van Pelt was a part owner in the Adelaide. Certain conversations between Deming and James Wood, who was examined as a witness, are also given in evidence by the complainant, to the effect that the former stated to the latter, in May, 1858, that the boat was built for parties in California; and the witness thinks that Deming, or the party who introduced him, stated that a person by the name of John Van Pelt, who died in California, owned the steamer. Complainant also refers to the conduct of Deming after the steamer was enrolled at the custom-house as tending to confirm the testimony, offered to show that he had knowledge that the title was defective, and, unless the ordinary rules of evidence are to be wholly disregarded, the circumstances proved are entitled to great consideration. Efforts to make the title satisfactory were not successful until Saturday evening, just before the time of closing the custom-house. While the negotiations for perfecting the title were going on, and only the day before they were closed, an agent of the heirs of John Van Pelt's estate arrived in the city of New York from California to look after this vessel. On his arrival he heard of the sale of the steamer, but having ascertained that she still remained at the wharf, and that she had not

been enrolled or inspected, he applied to the surrogate for administration on the estate. All this took place on Saturday; and that evening, after dark, Mr. Deming sent for Mr. Winchester, who had come on to take charge of the steamer as master, and directed him to have the smoke-pipe of the steamer painted that night, signifying at the same time that the steamer would sail on the following morning.

After his arrival in the city of New York, Winchester had acted as master of the steamer, but on Sunday morning William W. Vanderbilt took charge of her as master, and between seven and eight o'clock she sailed for Boston in a storm, when it blew so hard that she had to come to anchor at the mouth of the sound. Whether Deming knew the person who had arrived from California as the agent of the heirs does not appear, but it does appear that he was well known to the sellers of the steamer, and the circumstances afford strong ground to infer that the departure of the steamer was hastened as a means of discouraging further attempts to prosecute the claim. Taken as a whole, I am of the opinion that the evidence shows that the agents of the respondents had actual notice that the title of the sellers of the steamer was defective, and that she was built by monies advanced by parties in California; but at all events I am of the opinion that they had constructive notice that their grantors were not authorized to make the sale, and it is incomprehensible to me how any one who will read the record can come to a different conclusion.

Decree of the Circuit Court, I think, should be affirmed.

Mr. Justice MILLER: I am of opinion that ten-twentieths of the steamboat Adelaide were owned by John Van Pelt in his lifetime, and that the legal title passed to his administrators in California.

That no sale of that interest could be made by those administrators, by the law of California, without an order of Court, and as no such order was made, there was no valid sale of that interest to defendants.

I have not been able to find anything in the case to take the

transaction between defendants and Vanderbilt out of rule of *caveat emptor*. I am of opinion, therefore, that the decree of the Circuit Court should be affirmed, except as to two-twentieths, which I think were the property of Vanderbilt, and one-twentieth the property of Frank Johnson, which, with the other seven twentieths held by Chenery, passed to defendants by Vanderbilt's sale.

UNITED STATES *vs.* GALBRAITH ET AL.

1. In a California land case, the production of a fraudulent and false certificate of approval signed by the Governor and Secretary who signed the grant, and proved by the same witnesses in the same way that the grant was proved, affords (in the absence of explanatory evidence,) strong ground for believing all the title papers to be fabricated.
2. Where the date of a grant has been altered, while it was in the hands of the claimants and is produced to the Court without evidence, to show how the alteration came to be made, this Court cannot confirm the title.
3. The case of *U. S.* vs. *West's Heirs* reviewed, the facts stated from the original record, and all its features shown to be strikingly different from this case.
4. The fact that an espediente is found among those indexed by Hartnell in 1847–8, is no evidence that it was made at the time of its date.

This was a land claim originating before the Commission appointed under the Act of March 3d, 1851, and coming into this Court by appeal from the decree of the District Court for the Northern District of California.

The petition of John D. Galbraith, John Sime, Richard H. Sinton, and David T. Bagley asserted their right to a tract of land containing four square leagues in Sonoma, called the *Bolsa de Tomales*, bounded by lands of Juan Viojct, Bartolo Bojorques, the bay of Bodega and the creek (entre) of Tomales, under a

grant from the Governor, dated 12th June, 1846, to Juan N. Padilla, whose title by sundry mesne conveyances became vested in the petitioners.

The title papers consisted of 1. A petition for *four* square leages, signed by Padilla, addressed to the Governor and dated at Monterey, May 14th, 1846. 2. A marginal order of the Governor, dated Los Angeles, May 20th, 1846, directing the Prefect of the Second District "to report about the state of this land with all the particulars concerning the same," and declaring that "when the return is made the Governor will resolve." 3. A certificate of the Prefect (Manuel Castro) dated May 10th, 1846, that Padilla had made application for the land; that the espediente was in that prefecture; and that the reports show the land to be vacant and grantable. 4. A decree of concession dated June 12th, 1846. 5. A *borrador* of a grant for *five* leagues, dated same day. 6. The grant or *titulo* alleged to be the original and bearing the date of February 12th, 1846, signed by Pio Pico as Governor, and attested by Moreno as Secretary. 7. A certificate dated 14th June, 1846, and signed in the same way by Pico and Moreno, that the grant had been confirmed by the Departmental Assembly.

The last two of these papers were produced by the claimants from their private custody; the other five were brought from the Surveyor-General's Office, where they were found filed, arranged and deposited in the form of an espediente with a class of documents known as being comprised in Hartnell's Index. An account of that Index will be found in *United States* vs. *Knight's adm'rs.*, (1 Black, 227.)

Parol evidence was given by the claimants to prove the handwriting of Padilla to the petition, of Castro to the informe, of Pico to the order of reference, and of Pico and Moreno to the grant and certificate of approval. Moreno, the Secretary, was himself called, and he testified that the signatures to the grant and to the certificate of approval were genuine and made at the time those documents bear date. On cross-examination, he said that the grant appearing to be dated on the 12th of February, he could not have signed it then, for he was not in office until

afterwards, but he must undoubtedly have signed it before the 4th of May, and he was convinced that he did so.

The word *Febrero* was plainly written as the date of the original grant; all copies of it in the record have it so; and every official translation gives February as the date. The claimants, themselves, at first, recited it as of that date in their petition. But it appeared from the remarks of the Land Commission and otherwise, that the date had been altered by writing *Febrero* over some other word, probably *Junio*. Of this alteration no explanation was given to show when, how, or by whom it was made. The paper did not appear ever to have been in any custody but that of the claimants themselves, or the persons from and through whom the title was deduced.

The certificate of approval was shown not to be true by the journals of the Departmental Assembly. It was made certain by these records that no such grant as this to Padilla was ever laid before that body. But there was no evidence in the case besides that of Moreno, to show whether the false certificate was actually made by the Governor and Secretary or by some other person who counterfeited their signatures.

Mr. Hopkins, clerk in the Surveyor-General's Office and keeper of the archives, was a witness in the cause, and gave it as his opinion that the espediente was genuine. His testimony proved that this espediente was numbered 571 on Hartnell's Index, and that the grants in numbers 569, 570, 572, and 573, as well as some others indexed by Hartnell, were originally dated on days subsequent to the conquest, and afterwards altered to other days before the conquest. He regarded these latter grants as fraudulent.

Evidence was given of the occupancy and use of the land by the claimants. It did not establish any clear, notorious or well settled possession previous to the conquest or at any time soon afterwards.

The Land Commission decreed the confirmation of the title with strong expressions of reluctance and much doubt concerning its honesty. That decree was affirmed by the District Court from whence it came up to this Court by appeal where

the decree of the District Court was reversed and the cause remitted with directions to take further evidence, (22 How. 89). Much of the evidence referred to above was taken after the cause went back.

The District Court upon the whole evidence considered and adjudged the claim to be well founded in law. The decree in accordance with that opinion was brought to the Supreme Court on this appeal by the United States.

Mr. Black, of Pennsylvania, and *Mr. Gillet*, of Washington City, for the United States.

The title is not proved. The claimant has produced certain witnesses who swear that in their opinion, the signatures to the several papers, are genuine. This has often been held, not only insufficient and unsatisfactory, but inadmissible. The testimony of Moreno will not help them, because he is not a credible man, and because he has told an incredible story and for the still further reason, that his statement, if believed, is in conflict with the whole theory of their case.

There is no record of the title, and on this point the case in every material fact and circumstance, is precisely that of Knight, decided at the last term. The espediente is among those arranged in 1847-8, by Hartnell, who gathered his materials from the custom-house floor and from other places no better. He did not know a true title from a false one—had not the means of knowing—but picked up, put away and indexed whatever he got his hands on.

The reasons which induced the Court last year to reject that index, are strengthened a hundred fold by the evidence which comes up with this record. The testimony of Captain Halleck, showing how the papers were got, did indeed prove that they were just as likely to be true as false; but here we have evidence from the lips of Mr. Hopkins, that some of them are known to be false. The fact is established by affirmative proof that this very espediente, No. 571, lies in the centre of five: the two others on each side of it, are plainly fraudulent That settles the character of the index, if anything can.

But these title papers bear upon their own face sufficient evidence to insure their condemnation.

The informe is dated ten days before the order of reference. It is barely possible to suppose that this might be an innocent blunder. But the Court is certainly bound to presume nothing in favor of a title which presents such an anachronism. The language of the order and the declaration that *when* the prefect *shall report*, the Governor *will resolve* shows that the report did did not exist then; if it was made afterwards it is falsely dated, and if falsely dated it is a fraudulent paper.

The grant is dated three months before the petition. Now this date is either true or false. If it be true, the title is void; for on the principle of *Cambuston's case*, the Governor had no power to make a grant without a petition. The claimants seeing this difficulty and seeking to avoid it got into another by asserting that the date has been altered. By whom was it altered? By themselves of course, for it never was in any other custody. How was it altered? Fraudulently; for that is the presumption of law, when there is no explanatory evidence. It is in vain to say that the date of a deed is not material. Of such a paper as this it is the *most material* part. If it was made before the 14th of May, or after the 7th of July, it is a nullity. It is highly important, therefore, to know whether it was or was not executed at some intermediate time. The claimants did not permit the paper to speak for itself, but obliterated the name of the month and wrote another word over it, so that the true reading can never be known. After having themselves falsely and designedly spoiled the evidence, covered up the truth and put it out of your power, to ascertain when it was made they ask you to supply a date suitable to their interests by mere presumption. If all presumptions were in favor of the spoiler, and if Courts could act on the principle that suitors must be encouraged in falsifying their documents, then the reasonings of the claimants' counsel might have a chance of success; but the rule is directly the reverse.

There is another manifest and palpable fraud in those papers

The certificate of approval, is either a forgery out and out, or else it was made by Moreno and Pico with a knowledge that it was false. The claimants' counsel will not choose either horn of this dilemma; but they cannot escape. They introduced the certificate in evidence as a genuine paper, called Moreno to prove it, and he swore to its execution as he swore to the other papers. They gave it up only when the truth as proved by the journals became too strong to be faced down. If Moreno and Pico actually signed it, what is the value of other papers signed by them and proved in the same way? If their names are counterfeited, what shall be the moral status of the party that got it done and used it?

Mr. Hopkins' testimony to a *fact* is not to be disputed. But his *opinion* is out of place on this record. He has assumed to give judgment in the cause, and that judgment is manifestly erroneous, being unsupported by evidence, and contrary to the well settled law of the land.

The case of *West's Heirs* is not to the point. There the title was admitted to have been made for *one* league; but after the conquest, somebody (not the claimants) changed the grant so as to make it read for *two* leagues; and the question was whether this attempt to enlarge the grant destroyed it altogether. The Court answered in the negative, and that settled a *rule of property*. But here we are dealing with the *law of evidence*. The claimants can support their title only by proving that a grant was issued *after* the date of their petition, and they produce the original which is dated *before* the petition. To mend this fatal defect they assert that it was altered by themselves. This is certainly the first case on record of a party producing a paper which vested in him the only title he pretends to have, and asking a decree not because the paper is genuine, but because he alleges it to be a forgery.

A diseno or map is a necessary part of every land espediente, and is distinctly required by the regulations of 1828. There are cases in which its absence has been excused; but not cases like this.

Mr. Ashmun, of Massachusetts, and *Mr. Hill*, of Missouri, for the claimants.

The possession of the grantee is well made out, and sufficient of itself to give his alienees a right to be confirmed in their title. Alviso's case, 23 How., 318; Wilson's case, 1 Black, 267; De Haro's case, 22 How., 293.

The Court is bound to act upon principles of equity, and therefore to confirm the claim according to the possession although a suspicious criticism may be able to raise a doubt concerning the completeness of the espediente and the grant.

A map was not necessary in this case. The description of the land was perfect without one. The external boundaries could not be made more distinct by a diagram on paper.

Knight's case is not authority against the validity of this espediente or against the truthfulness of Hartnell's index. Knight's espediente had many infirmities and irregularities, which are not found in Padilla's. It had no informe, nor was any original grant produced, and its genuineness was impeached by proof that Knight was not in a condition to receive such a grant.

Nor is it just to deny the integrity of the index because there are in it some espedientes besides that of Knight which are false Hartnell found them, and though they appeared on their faces to be altered, he did not presume to decide upon the legal effect of those alterations. The index is conclusive on the United States as proof that the espedientes all belonged to the Mexican archives, but the value of each one must depend on the special circumstances connected with it. Knight's case justly fell by its own demerits.

The value of Mr. Hopkins' testimony can hardly be over-estimated. He is (and the counsel on the other side acknowledge it) a most faithful public officer of twenty years experience, an upright man, and every way a credible witness. He pronounces this espediente to be genuine. And there is other evidence besides his to prove the handwriting of the several signatures.

The alteration of the grant by changing the date is immaterial; it would be as valid if made in June as in February. The

records show that it was actually made in June; the title was vested before the alteration took place, and the alteration could not operate as a forfeiture. It is not known when, how, or by whom the alteration was made, but it is not important since the archives and other evidence *aliunde* show that a good title existed before the conquest. The case of *West's Heirs* is directly in point, and its authority is conclusive.

The certificate of approval is said to be a forgery. This cannot defeat the claimants' right. If it were genuine, its production would be unnecessary. That principle is established in *Fremont's case* (17 Howard), and by the three cases of *Cruz Cervantes, Vaca*, and *Larkin*, in 18 Howard. A good title having been proved cannot be divested by proof that another document offered in support of it is forged. *Lloyd* vs. *Panningham*, (16 Vesey, 59).

Mr. Justice NELSON. This is an appeal from a decree of the District Court of the United States for the Northern District of California.

The case presents a California land claim filed before the Board of Commissioners April 29, 1852, by the assignees of Juan N. Padilla, to whom the original grant as alleged was made of a tract of land containing five square leagues, 12th of June, 1846, situate in the Department of Sonoma, and known by the name of "Balsa de Tomales."

The claim was confirmed by the Commissioners, and on appeal by the United States to the District Court the decree was affirmed. Afterwards an appeal was taken to this Court, where the decree of the District Court was reversed, and the cause remitted to that Court for further testimony. The case will be found reported in the 22 How., p. 89.

This Court, after referring to the grounds of objection to the claim, namely, the unsatisfactory proof of any possession or occupation of the tract, the alteration of the date of the original grant of the title in form, which was in the hands of the grantee and his assigns, and the questionable character of the certificate of approval by the Departmental Assembly produced by the

claimants, expressed the opinion, that, in consideration of the doubtful character of the claim and entire want of any merits upon the testimony, the decree below should be reversed and the case remitted for further examination. Since then much additional evidence has been taken by both parties before the District Court, which Court again affirmed the decree of the Commissioners, and the case is now here on an appeal from that decree.

The espediente produced before the Commissioners and Court below, contained the petition of Padilla, dated Monterey, 14th of May, 1846, the informe dated at Los Angelos, 20th of May, the certificate of Manuel Castro that the land is vacant and grantable, dated at Monterey, 10th of May, and the title in form dated at Los Angelos, 12th of June following, the latter signed by Pio Pico, the Governor, and Jose Matias Moreno, Secretary. A certificate of the approval of the Departmental Assembly, signed by the same Governor and Secretary, dated at Los Angelos, 14th of June, same year, was also filed with the papers, together with the original grant which had been delivered to the petitioner, Padilla. This instrument is dated at Los Angelos, 12th of June, 1846, altered to 12th of February of the same year.

The genuineness of the signatures of the Governor and Secretary to these evidences of title is proved by several witnesses, and, among them, by Moreno himself, the Secretary. The fact upon the proofs cannot well be denied, and if there was nothing else in the case affecting the integrity of this title, we could concur with the Court below in confirming it. But two objections are taken to these papers, which, in our judgment, have not been satisfactorily met or explained. The first is, that the certificate of approval by the Departmental Assembly is a fabrication. The records of that Assembly, which are in good condition, prove the fact, and which is admitted in the brief of the counsel for the claimants. It was also so held by the Court below Now, the signatures of the Governor and Secretary to this certificate are proved to be genuine with the same strength of evidence as they are to the document of the formal title. Mo-

reno testifies with the same fulness to the signatures in the one case as in the other. The fabrication of this certificate, therefore, is not the work of a stranger or of a party interested, but of these functionaries themselves. As their signatures to it are genuine, these persons are necessarily implicated in the fraud, as the certificate could not have been fabricated without their participation. There is no escape from this conclusion. It might have been met by proof that their signatures were forged. This would have relieved them and the title from much of the suspicion and doubtful character resting upon the title, though not entirely, as the use of fraudulent papers by the claimant in support of a claim cannot but excite apprehension and caution. But no attempt was made to prove that these signatures were forged. On the contrary, every witness called and examined in respect to them testifies to their genuineness, and as we have seen, Morena himself, one of them.

This paper was regarded by the public authorities in California as well as by the petitioners for a grant of a portion of the public lands as very important in the perfection of the title. The grant in form by the Governor, in express terms, is made "subject to the approval of the most excellent Departmental Assembly." Such is the condition annexed, according to the law of 1824, and the regulations of 1828. This Court has dispensed with the condition in favor of these grants, which were in all other respects unobjectionable.

This paper, therefore, thus fabricated by Pico and Moreno while engaged in making the grant of the land in question to Padilla, cannot but connect itself closely with all the other documentary evidence of the title, especially that portion of it to which their names were essential, namely, the grant of the title in form.

Of the documentary evidence of title, under the Mexican laws, the approval of the Departmental Assembly was next in importance to the grant itself. If it must be admitted that these functionaries have been guilty of fabricating one of the documents to which their names are attached in making out the grant, what assurance have we from the mere fact of the

genuineness of their signatures that they have not fabricated the other. Dates of time and place afford no protection, as these can be fixed to the document at the will of the parties. This certificate of approval bears date city of Los Angelos, 14th June, 1846. But these could be fixed to the paper, if fabricated, at any time after it purports to bear date, as well as at the date itself. So as it respects the time and place fixed to the document of the formal title, which purports to have been made at the same place and on the 12th June, 1846. If fabricated, like the certificate of approval, the date or place affords no security of its genuiness. We have no record to detect the fraud, if committed, in respect to the title in form in this case as we have in many of these grants. The usual memorandum is made at the foot of the grant by Moreno, the Secretary, as follows: "A note has been taken of this dispatch of the Supreme Government in the appropriate book."

Now, if a note of this grant had been found in the book of records, the Tomada razon, as it is called, of this date, as is certified by the Secretary, it would have been entitled to great weight in relieving the title of much of the suspicion resting upon it. The counsel for the claimants insist that the proof furnished on this point, under the circumstances and condition of the country at the time, should be regarded as equivalent. The Mexican records of these grants which were at the city of Los Angelos in August, 1846, were placed by the Governor in the keeping of one Vignes, in boxes, a short time before he fled from that place, which was on the 10th of that month. These archives came into the custody of Colonel Fremont, and were carried to Sutter's fort, and kept there till 1847, when they were removed to Monterey, and were placed in the charge of Mr. Hartnell, who made an index of the espedientes found among the archives, but not noted in any book. This grant to Padilla was found among them and indexed by Hartnell. Now, the argument is, that it must have been among the Mexican archives in the possession of Pico at the time he placed them in the hands of Vignes when he left the city of Los Angelos. This may be so. But, Pico, Moreno, M. Castro, and Padilla, whose names are connected with

the grant, were at the city of Los Angelos from the 22d of July till the 10th of August, when they fled, within which time this grant could have been made and placed among the archives, and during which time the Governor had no authority to make any grant. This Government was in possession of the country as early as the 7th of July, 1846. It will be seen, therefore, that the fact of finding the espediente among the Mexican grants in the hands of Hartnell affords no evidence that it must have been made at its date. We agree, if it was not connected with the other document of title, an admitted fabrication, committed, if we believe the date, two days after the date of the grant, the above facts would be entitled to consideration. But, as we have seen, the fabrication of the grant was as practicable by these parties as that of the certificate of approval consistently with the fact of the deposit of the espediente among the archives at Los Angelos before their removal to Sutter's fort.

It is worthy of remark in this connection, that the certificate of approval and the title in form, both came from the hands of the claimants, and of course both had been delivered by the Governor and Secretary to Padilla, the grantee. They were filed before the Board of Commissioners on the 28th March, 1853, and no explanation in respect to the certificate was given or attempted, either before the Board or the Court below.

The next objection to the documentary evidence of title is the alteration of the date of the title in form from 12th June, 1846, to the 12th February preceding,—the word February over the word June. The only attempt to explain this alteration is found in the testimony of Danglada, a witness for the claimants. He testified before the District Court that the papers were delivered to him by Padilla in the month of December, 1850, for the purpose of making a sale of the lands. That at this time they had been mortgaged by Luco, the owner, to Padilla, and both were interested in the sale. The witness acted as the agent of both. On his examination in chief he testified that the date of the paper was not altered when it came into his hands, nor while in them, and that the alteration must have been made afterwards. But, on cross-examination, his attention was called to a deed

executed on the 1st March, 1852, by him, as attorney for others, of this tract, in which is recited the grant by Pico to Padilla as of the date of 12th February, 1846, and he was asked to explain this date, when he was obliged to admit that he might be mistaken. This is all the explanation that has been offered.

The case of the *U. S.* vs. *West's Heirs*, (22 How., 315,) has been referred to as an instance of the confirmation of a Mexican grant which was subject to the imputation of a forgery in the alteration of the title in form. The alteration consisted in enlarging the grant of one and a half leagues to two and a half, "un sitio to dos sitios." The grant was made to West in 1840. He had been in the possession and occupation of the ranch from 1838 till 1849, when he died. Had made extensive improvements in buildings and cultivation; among other improvements a grist-mill and cultivation of two hundred acres of grain and vegetables, besides a stock of two hundred horses and two thousand cattle. The case is not fully reported in the 22 How., and the above facts are obtained from the original record. The attorney general admitted the grant when made was genuine and honest, and that the only objection to it was the alteration. The papers, after the death of West, came into the possession of the widow and were necessarily entrusted to other hands for the purpose of procuring a confirmation. There was no evidence tending to prove that the alteration took place while in the hands of West, and taking the admission of the government that the original grant was genuine and honest, in connection with the possession and improvements, this Court concurred with the Court below in the confirmation of the league and a half. The features of that case upon the evidence were strikingly different from the present one.

There has been no possession or occupation in this case deserving of notice in aid of the title, or as evidence of any merit on the part of the grantee. Indeed, the weight of it is decidedly against a possession beyond that in common with the owners of other ranches in the neighborhood. The grant was made, according to its date, only twenty-five days before the United States took possession of the country. Padilla had a

previous grant of the ranch Roblar de la Miseria, in the same neighborhood, made on the 25th November, 1845, only a few months before the application for the one in question. Some of the witnesses confounded the occupation of this tract for that of the Balsa de Tomales. Another difficulty in the way of yielding our assent to the integrity of this grant is, that as early as the last of May or the first of June, 1846, Padilla was at Sonoma, or in that neighborhood, some five hundred miles from Los Angelos where this grant purports to have been made. He was at the head of a party of Californians in the disturbances which about that time broke out between them and the American settlers, and was charged with having participated in the murder of two of them. He fled about the middle of the month to the south side of the bay of San Francisco and joined the forces of Castro, the commander-in-chief of the Californians; and, according to the evidence of Morena, the Secretary, he came down with Castro and met Governor Pico and party at Santa Marguentta, which was some one hundred and fifty miles below Monterey. Castro and Pico united their forces and passed on to Los Angelos, where they arrived on the 21st or 22d July, and remained till 10th August, when they fled South. It is clear Padilla could not have been at Los Angelos at the time the grant purports to be dated, and ground for strong doubt as to his being at Monterey May 14, at the data of the petition. All the parties to these documents of title, Pico, Moreno, M. Castro, and Padilla, were with the forces of Pico and General Castro at Los Angelos during the nineteen or twenty days they remained at that place. It was within their power to have made this grant while thus remaining together; and, as it is admitted that the certificate of approval of the Departmental Assembly was fabricated by two of them, we cannot but distrust upon all the evidence that the espediente, including all the papers relating to the title, was fabricated in the same way and at the same time.

KING *vs.* ACKERMAN.

1. It is an established rule of the common law, that a devise of lands without words of limitation confers an estate for life only.
2. But because this rule generally defeated the intention of the testator, the Courts have been astute in finding exceptions to it.
3. Where land is devised without legal words of limitation, and a provision is added that the devisee may do therewith as he pleases, a fee is presumed to have been intended.
4. It is also well settled, that where a devisee whose estate is not defined, is directed to pay debts, legacies, or a sum in gross, he takes a fee.
5. This last rule though founded on inference is as technical and rigid in its application as that to which it is an exception; for Courts will not inquire into the relative value of the land and the charge, nor decide on the probability of the devisee being called on to pay the charge.
6. Where a testator gives one piece of land to his son with the privilege of doing therewith as he pleases, and makes another devise to the same son, without using those or any similar words, it does not follow that there was no actual intent to give a fee in the last mentioned land.
7. A Court may look beyond the face of the will, to explain an ambiguity as to the person or property to which it applies, but never for the purpose of enlarging or diminishing the estate devised.

This case came up on a writ of error to the Circuit Court for the Southern District of New York. It was an ejectment for certain lots now within the limits of the city, and formerly part of the estate of Lawrence Benson, deceased.

Lawrence Benson, at the time of his death, had two tracts of land, which he held in fee, one occupied by himself and one by George Williams. He had one son and two grand-daughters, the children of a deceased daughter. He died in 1822, having

made the will copied in the opinion of the Court, by which he gave the Williams' place to his son Benjamin, "to do and dispose of as he may think proper;" and the Homestead, without words of limitation, charging the devisee with the payment of $1,500 to his grand-children. The lots in controversy were part of the Homestead. The plaintiff, after the death of Benjamin Benson, claimed an interest therein, as one of the heirs-at-law of Lawrence Benson. The defendant asserted his right under conveyances made by Benjamin Benson in his lifetime. The question was, whether the will gave Benjamin a fee in the Homestead, or only a life estate.

On the trial before the Circuit Court, the plaintiff offered evidence, to show that the Williams' place, at the date of the will, and ever afterwards, was worth greatly more than the sum charged upon the devisee in favor of the testator's grand-children. This evidence was rejected, and Mr. Justice Nelson held that, by the legal and true construction of the will, Benjamin Benson took a fee in both places. Whereupon the plaintiff sued out this writ of error.

Mr. Cutler, of New York, and *Mr. Black*, of Pennsylvania, for the plaintiff in error, argued that the will, properly construed, according to the law of New York, as it stood in 1822, gave Benjamin Benson no more than a life estate in the Homestead place; that the fee simple remained undisposed of, and descended to the testator's heirs-at-law, of whom the plaintiff was one, and that she had a right, after the life estate terminated, by the death of Benjamin, to recover her share in it.

It is undeniable that a devise of real property, *to do and dispose of it as the devisee may think proper*, creates an estate in fee. It is equally clear that, by the common law, a devise of land without words which in any way denote the quantity of a donation of the estate, passes nothing but an estate for life. Benjamin, therefore, took a fee in the Williams' place, and by the words of the will, giving him the Homestead, he could have only a life estate in that

It is also admitted, that where a testator gives land without

words of limitation, as in this devise of the Homestead, and therefore, by the words of the devise, gives a life estate only such life estate will be enlarged to a fee if the same will imposes upon the devisee a personal charge with respect to the estate devised. This rule is founded on the *natural* presumption, that no testator would expose his devisee to the possible danger of becoming a loser by his bounty. The testator, in such a case, *must have meant* to give a fee; because, if it were a life estate, the devisee would, by accepting it, render himself personally liable for the sum charged on him, and he might die before the profits would be equal to the charge.

But there is no case in the books like this. Here were two devises, to the same person, of two different pieces of land, both of them greatly exceeding in value the amount of the personal charge upon the devisee. One is in fee, and the other for life. The devisee could take what was given by the words of the will; he could assume the charge, and he could not possibly be a loser, though he should die the next instant. To avoid the danger of a loss, it was not necessary to presume that a fee should be given in both places. The testator had provided against that danger by simply giving his son a fee in one of them.

But it is suggested that the farm in which a fee was given might possibly not be equal in value to the charge, and *if that be the case,* then a loss might possibly ensue to the devisee, by his death, before he could make the deficiency out of the life estate in the other. Surely the principle of no decided case, nor no logic that is sound, can justify this argument. Where a testator gives land without saying for what estate, the Courts must ascertain his actual intent as well as they can. From the naked devise the inference is, that he meant a life estate only; but if a personal charge in respect of it be imposed, you infer fairly and naturally that he meant a fee, because nothing less than a fee can make the devisee absolutely safe. You reason here, as in other cases, from a fact that is known to another fact which is not known. But if you infer the testator's intent from the supposed inadequacy of the fee simple, you reason to one unknown fact from another fact equally unknown. To justify a Court in

saying that the testator meant to give a fee without saying so, it is necessary that the possibility of loss should be clearly and plainly established as an undisputed fact. It is not to be assumed and imagined, and then made the basis of presumption for another fact.

That the possibility of loss to the devisee is established here as a known fact, will hardly be contended; nor can we suppose that the Court will consider it even probable in the face of the plaintiff's rejected offer to prove the contrary.

The presumption that a testator meant a fee, because the devise is coupled with a charge, is not a presumption of law, but of fact; not legal and conclusive, but natural and open to be repelled by counter proof. It was, therefore, erroneous to reject the plaintiff's evidence.

But the plaintiff did not need the evidence. It was for the defendant to show that the Williams' place was worth less than the charge. The error of the Circuit Court consisted in assuming the possibility of loss to the devisee when that fact was not proved, and upon evidence which shewed it to be at least as probably false as true.

Again, it will be agreed that if the testator's intent to give no more than a life estate is apparent on the face of the will, it will not be enlarged to a fee by implication from a personal charge. In this case it is clear that he could have intended no more than a life estate. He gave one place with words of perpetuity and followed it with a gift of another omitting those words, and omitting all words of equivalent import. I *give* Benjamin the Homestead *to dispose of as he thinks proper*, and I *give him* the Williams' place. Is not this as clear as if he had said *I give him* the Homestead and the Williams' place, and *as to the former* he may do with that as he pleases? Is not the omission of the enlarging words in the latter devise as plain an indication of the testator's intention to make it a life estate as if he had expressed it in words?

Mr. O'Conor, of New York, for Defendant in Error.

This case does not differ in principle from other cases in which

the Courts have held it to be settled law that a devise of an estate in land without words of perpetuity is enlarged to a fee by charging the person of the devisee with the payment of money. The fact that other property was given in fee by the same will to the same person may furnish the ground for an argument, but not for a sound distinction.

It was not the intention of the testator that Benjamin should take the property in question with the power of alienating it; but as it had come to him from his father, he meant that it should pass from his son to his heirs. The words connected with the other devise, "to do and dispose of," &c., were intended to give the power of alienation, not to increase the estate. To give was, in his mind, to give absolutely and forever, and "to do and dispose of as he might think proper," could add nothing to the duration of the estate bestowed in the Williams' place, and the absence of those words in the devise of the Homestead would not make the estate in that any less. The supposed necessity for the use of those words arose out of the testator's opinion that in the case of a family estate the right to alienate did not legally exist as an incident of ownership, but must be created by superadded words expressly giving the power.

It is not denied that where property is given in a will without words of limitation, the donee can by force of the words alone take nothing but an estate for life. The testator has not expressed the idea of giving him any more, and the Courts cannot see any method of giving him any less. Consequently it is a necessary implication that he should take for life.

This rule is too old and too well settled to be questioned or shaken. But there is another rule equally well established—as old as the days of Coke—which insures our safety. Where, on a gift of lands without limitation, there is a charge on the person of the devisee, which the devisee will incur as a binding personal obligation, if he accepts the devise, he becomes a purchaser. And as a purchaser under a will and not a deed, purchasing without words of limitation or qualification, he, by reasonable inference and construction buys the thing absolutely. As in all other like cases of purchase, the Courts will supply

any words of limitation or any assurances that may be deemed necessary to make the title absolute and perfect.

Such being the principle upon which the rule is founded its application to this case is clear as to any other. What difference can be made in the right of the devisee to take the Homestead absolutely as a purchaser by the fact that another estate is expressly given him in full property? Having acquired them both for a consideration and having paid or bound himself to pay the price he is certainly not compelled to take one as a mere life tenant because the testator declared that he should have the other in fee. If the testator had been totally silent concerning the quantity of estate—had omitted to couple either devise with words of limitation, the law would have given both in fee. But the testator as to one devise *expresses the legal conclusion.* Does that destroy the devisee's right to have a legal conclusion drawn from the other?

This old rule which presumes that a testator meant to give land, only for life when he uses no words to express the quantity of the estate, defeats the actual intent in most cases. Experience has shown it to be mischievous. The justice and good sense of the world has abolished it. It has ceased to exist in England and in nearly (perhaps all) the States of this Union. The Courts were always more anxious to find exceptions to the rule than to enforce the rule itself. If, therefore, it be doubtful whether this case is within it or not, the Court will give the benefit of that doubt to the devisee.

It was proposed to show upon the trial that, at the time the decedent made his will, and at the time of his death, this Williams' lot was worth enough in the market to have paid the $1,500.

The title to land should not be permitted to turn on questions of that character. If it should be thought proper to look at the question of value, you would perceive that the testator could not have had any knowledge what would be the value of the land, in which it is said a fee simple was unmistakably given, at the point of time when his son might be coerced to pay this sum of money; and consequently the value of that land, as a

distinct subject from which to obtain the means of paying this legacy of $1,500 could not have entered into his contemplation, consequently the gift of these two pieces of land, placed as it is in one section, must be taken as an entirety; and the sum specified in the second clause of the will must be regarded as a condition imposed upon the devisee in respect to the whole property mentioned in that section.

There is one view of the case in reference to the words of limitation which deserves attention concerning the Williams' lot, the devisee was to do and dispose of it as he might think proper. This certainly meant that he was to have it *free of all charges and incumbrances whatever.* If he was bound to raise $1,500 out of it he would not have power to dispose of it, as he might think proper. On the contrary the residue only would be delivered over to his absolute disposition. The Homestead is not declared to be unfettered and the intent of the testator must therefore have been to impose the charge with respect to that alone. This seems a conclusive answer to that part of the argument on the other side which asserts that the charge was imposed only with respect to the Williams' place.

Mr. Justice GRIER. It has been an established rule, in the construction of wills, that a devise of lands, without words of limitation, confers on the devisee an estate for life only. This rule was founded rather on policy than on reason; for while it favored the heir-at-law, it generally defeated the intention of the testator. This is acknowledged by Lord Mansfield in *Loveacre* vs. *Blight,* (Cowper); and the interference of modern legislation, to abolish the rule and establish a contrary one, is evidence of the correctness of his remark. This change has been effected by statute in England and most if not all of the States of this Union.

The will now presented for our consideration was made before this obnoxious rule was repealed in New York, and we are compelled to examine its provisions fettered by this technical, artificial, and now nearly obsolete rule of construction. Courts have always been astute in searching for some equivalent

popular phrase, or some provision of the will incompatible with such imputed intention, to rescue it from the effect of this rule. Thus, when a testator devises land without legal words of limitation, but adds that the devisee "may sell or do therewith as he pleases," he is presumed to have intended to give a fee, because such a power would be incompatible with a less estate. It is a long settled rule also, that where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee. The reason on which this rule is founded is, that if the devisee took a less estate he might be damnified by the determination of his interest before reimbursement of his expenditure. This rule, though founded on inference or implication, is nevertheless as technical and rigid in its application as that to which it is an exception; for the Court will not inquire into the relative value of the land and the charge; or, if the charge be contingent, will not weigh probabilities as to whether the devisee will ever be called on to pay it. The intention of the testator as to the limitations of an estate devised can be judged and decided only from his own language as contained within the "four corners" of his will. Parol evidence cannot be received to show that such inference was not founded on probability, or that this rule of construction ought not to apply under certain circumstances. This would in effect be delivering the power and duty of construing the will to a jury.

The will of Lawrence Benson is very brief and is as follows:

"*In the first place*, I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by George Williams, to do and dispose of as he may think proper.

I also give and bequeath unto my son, Benjamin L. Benson the Homestead where I now live, situated on Harlem River.

Secondly. My will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of $1,500.

Thirdly. The income of these legacies, and also of my estate, real and personal, I give unto my loving wife, Maria Benson,

during her widowhood, to do and dispose of as she may think proper."

It is plain that this instrument has been written by a person "*inops concilii*," and wholly ignorant of proper legal phraseology.

He uses the term "bequeath" instead of "*devise*" in the gift of his real estate.

By the first clause he gives his two pieces of real estate to his son Benjamin, who appears to be the chief object of his bounty.

By the second, he charges the sum of $1,500 on Benjamin to be paid to the grandchildren of testator.

By the third, he gives to his wife a life estate on all of his estate, real and personal, to be forfeited if she marry again.

Now, we must observe,

1st. That the son has clearly but an estate in remainder in the lands devised to him.

2d. That it is a vested remainder.

3d. That this testator not only postpones the possession and enjoyment of the land devised to his son for an indefinite time, but charges him with the payment of a gross sum of money, which he will be personally liable to pay, for land which he may never personally possess or enjoy.

If the charge is sufficient in law to give the devisee an estate in fee by implication or presumption, how much stronger is this presumption when his enjoyment of it is indefinitely postponed.

But it is contended, that, because the testator has used the phrase "*to do and dispose of as he may think proper*," as regards the Williams' farm, and in the devise of the Homestead has omitted it, such omission as to the latter is equivalent to an express limitation of it to the life of the devisee; and that the Court ought to presume that the sum to be paid was intended as a consideration for the first only; and if they will not presume it for want of evidence of its sufficiency, that parol evidence ought to be admitted to show the value of the Williams' property to have been more than sufficient to pay the sum plainly charged on both.

Now there is no established rule of construction that if a

testator having devised two messuages to his son and charged the devisee with the payment of legacies that if he add this informal power as to one, it is equivalent to an expressed limitation as to the other. Nor is it a necessary inference or logical conclusion, arising from the omission to use certain informal words, which have been construed to show an intention to give a fee as to one, that the testator did not intend to give a fee in the other of the messuages charged. Besides, it is clear that Benjamin could not repudiate his obligation to pay the legacies by refusing to accept the gift of the Williams' farm, while he retained that of the Homestead. To conclude, therefore, from this fact that the testator did not intend to give a fee in both would be mere conjecture, and that, with no sufficient reason to support it.

The face of this will shows that the testator did not suppose these informal words, giving a power to sell as to one, were necessary to enlarge the estate to a fee, much less that their omission would limit the devise of the other to a life estate, for he adds the same power to the life estate given to his wife.

If we were to indulge in conjecture, why this phrase was coupled with one of the estates devised and not with the other it would be, that the testator intended to confine the charge of the legacies to the "Homestead" and not the Williams' farm, or that he wished the one to remain in the family and name, while the son should be at full liberty to dispose of the other as he might think proper.

The rule of law which gives a fee, where the devisee is charged with a sum of money, is a technical dominant rule, and intended to defeat the effect of the former rule which itself so often defeated the intention of the testator.

Courts have always been *astute*, as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir-at-law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it We are not compelled to make this inference or implication through submission to any established rule of construction; on the contrary, we are required to make an exception to one on

mere conjecture, and to introduce parol testimony as to value to justify a departure from it. A Court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.

We are of opinion, therefore, that Benjamin L. Benson took an estate in fee in both the messuages described in the will.

The judgment of the Circuit Court is therefore affirmed with costs.

CHICAGO CITY *vs.* ROBBINS.

1. A municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; if this duty be neglected, and in consequence thereof, any one is injured, the corporation will be liable for the damages sustained.
2. The corporation, has, however, a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong.
3. A private party is concluded by a judgment recovered against a corporation for his act or negligence, if he knew that the suit was pending and could have defended it.
4. An express notice to such party to defend the suit, is not necessary to create his liability.
5. But in an action brought by a corporation, against such party, to recover back the damages it has been compelled to pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition, and that it was not through his default that the accident happened.
6. In such case, if it appears that there was fault both on the part of the corporation and defendant, the former cannot recover

for the reason that one of two joint wrong-doers cannot have contribution from the other.

7. If a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable, but if it happened by the negligence of the contractor or his servants, the contractor alone is responsible.

8. Where rules of property in a state are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts.

9. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions.

This was a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Anthony, of Illinois, for Plaintiff in Error.

Mr. Fuller, of Illinois, *Contra.*

Mr. Justice DAVIS. This is an action on the case brought by the City of Chicago against Robbins. The suit was originally commenced in the Cook County Court of Common Pleas, one of the State Courts of Illinois. In was transfered, in pursuance of the act of Congress, on the petition of Robbins that he was a citizen of New York, to the Circuit Court of the United States for the Northern District of Illinois, where there was a trial by jury on the 10th day of April, 1860, on the plea of not guilty, and the issue found for Robbins. There was a motion for a new trial, which was overruled by the Court, and on the 28th day of May, 1860, judgment was entered on the verdict of the jury. The decision of Circuit Courts on motion for new trials is not subject to review, and this case is here on exceptions taken to the charge of the Judge to the jury.

The declaration alleges: That the plaintiff is a corporation by the laws of Illinois, having exclusive control over the public streets, and bound to protect them from incroachment and injury.

That Robbins was the owner of a lot on one of the public streets, and wrongfully excavated in the sidewalk next to and adjoining his lot, an area of great length, width, and depth, and wrongfully suffered the same to remain uncovered and unguarded, so that one William H. Woodbury, on the night of the 28th of December, 1856, while exercising reasonable care and prudence in passing along the street, fell into it and was greatly injured. That Woodbury brought suit against the City, in said Cook County Court of Common Pleas, and at the June Term, 1857, of the said Court recovered a judgment for $15,000 and costs, which the City has been forced to pay, and that although the City is primarily liable, yet Robbins is responsible over to it for the amount of judgment, interest and costs so recovered. The case as shown by the bill of exceptions is *this:* Robbins, owning a lot in Chicago, on the southeast corner of Wells and South Water streets, on the 20th of February, 1856, contracted in writing with Peter Button to erect a building thereon, which included an excavation of the sidewalk next to and adjoining it, so as to furnish light and air to the basement. The contract contained a stipulation that Button was to be liable for any violation of City ordinances in obstructing streets and sidewalks, or accidents resulting from the same. Possession of the ground in order to erect the building, was given to Button, by the terms of the contract, on the 1st day of April, 1856. The area was dug early in the spring and covered up temporarily with joists, which often got displaced, and during the summer and fall it was frequently uncovered and dangerous. The flagging was laid some time in the fall and the iron gratings afterwards, with which Button had nothing to do.

There were seven different contractors on the building, in all, on different parts of the work. Letts had the contract for the iron gratings, and Cook & Co. for the flagging. Robbins was in Chicago, and occasionally at the building during the summer, and was there while excavations were going on, and was spoken to frequently by the City Superintendent upon the dangerous condition of the area. At one time after the flagging was laid, and ice was or had been on the flagging, he called Robbins'

attention to the condition of the area, and suggested the mode in which it should be covered up, "telling him that if it was sleety and people were passing rapidly they might slip in, and that somebody's neck would be broken, if the covering was not attended to," and he replied "that he would see to it, but that the matter was in the hands of his contractor, and he would speak to him about it." Before this, the head clerk in the office of the City Superintendent wrote Robbins a note and put it in the post-office, notifying him of the danger of the whole front of the sidewalk. The area was usually entirely open after flagging was laid, until after the grating was all done, and was open until after the accident. There were lamps at bridges, and a lamp at alley, sixty-four feet from the building. The width of sidewalk including area, was sixteen feet. The area was four feet ten inches wide. The grade of Wells street was changed by the corporation; the sidewalk was raised eight inches higher than it was, to accommodate it to the grade of the street; it was raised in July or August 1856, and Robbins directed Van Osdell, his architect, to raise the sidewalk to the grade. Van Osdell superintended the erection of the building for Robbins, who paid him; his duty as superintendent was to see that the work was done according to contract; to see "that the work and material were according to specification, and make estimates." Button was told of the dangerous condition of the area, and spoke several times to his foreman about it. Button was to furnish his work under the contract by the 1st of September, but did not in fact complete it until February, 1857. On the night of the 26th of December, 1856, the area was not sufficiently covered, and Woodbury fell into it and was injured, and sued the City and recovered in manner as stated in the declaration. Marsh was City attorney in 1856, and when the suit was begun, he made preparations for its defence, and ascertaining that Robbins owned the building applied to him to assist him in procuring testimony. Robbins told him of a witness who knew something of the suit, and promised to write to him, and afterwards informed Marsh that he had done so. The evening before the trial he casually met Robbins and told him that the suit would be tried the next

day; he did not go expressly to notify him to defend the suit, and never notified him that the City would look to him for indemnity. Evidence was given tending to show that the City authorities knew of the excavation of this area, and of other areas similar to this at different times, and interposed no objection, though no express permission to make this one was given.

The defendant introduced in evidence the following provision of the Ordinances of the City of Chicago, viz.:

"ARTICLE II—OBSTRUCTIONS. CHAPTER LIII., SECTION 1.

"*Be it ordained by the Common Council of the City of Chicago,* That no porch, galley, stoop, steps, cellar door, stair railing, or platform, erected or to be erected within the city, shall be allowed to extend into or upon any sidewalk where the street is less than seventy feet in width, more than four feet; nor more than five feet, where the street is seventy feet and upwards in width Any violation hereof shall subject the offender to a penalty of twenty-five dollars, and to the like penalty for every day such violation shall continue, after notice from the Marshal or Street Commissioner of the proper Division to remove the same."

It also appeared in evidence, that the original ordinance from which the foregoing provision is taken, was passed May 8d, 1855, but, as then passed, did not allow of more than four feet encroachment upon the sidewalk in any case. On the 7th of February, 1856, the ordinance was amended by the City Council to read as above.

Is Robbins, under the law and evidence, answerable over to the city for the judgment recovered by Woodbury?

It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrong doer. If it

was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it.

An express notice to him to defend the suit was not necessary in order to charge his liability. *Barney* vs. *Dewey*, (13 John., p. 226); *Warner* vs. *McGany*, (4 Vt., 500); *Beers* vs. *Pinney*, (12 Wend., 309).

He knew that the case was in Court; was told of the day of trial; was applied to to assist in procuring testimony; and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. It is insisted, that inasmuch as Robbins had no express permission from the City to encroach on the street, that he was engaged in an unlawful work, and the digging of the area was in itself a nuisance. So far as the City impliedly could give authority to make this area, it was given; the corporation undoubtedly knew that this area was in process of construction, and that many similar ones had been built since the grade of the City was raised, and yet no objection was ever interposed. Areas, like the one in controversy, are convenient to the owners of adjoining buildings, and useful in affording light and air, and if during their construction they are properly guarded and protected, they are no essential hindrance to the public in their right of transit over the streets. The public have a right to the free passage of the streets, and yet that right cannot always be enjoyed. Improvements could not be made in a large City; houses could not be built, or repaired even, without the streets being at some time obstructed. In *Commonwealth* vs. *Passmore*, (1 Serg. & Rawle., 217,) the Supreme Court of Pennsylvania say: "It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute, it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure. But inasmuch

as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner.' "But these encroachments on a street must be reasonable, not continued longer than is necessary, and must be properly guarded and protected so as to secure the public against danger, and if these things do not concur, then they become nuisances and can be abated." *Clark* vs. *Fry*, (8 Ohio State Reports, 359).

Was the building of this area a necessary encroachment on the street; and if so, were the proper steps taken to secure it so as to protect the public from injury? The fact that an improvement may become dangerous, and involve great hazard, is no argument against the propriety of making it. If by great care, and more than ordinary diligence, it can be made, and the public saved from harm, and it is also necessary, then the right to make it is solved. The grade of the City was doubtless raised to secure light and air to basements, to get good cellars, and for purposes of drainage. The value of property in a City is much enhanced by the erection of solid and durable buildings, and every proper facility to perfect them should be given to builders. If it is necessary, in order to make a better building to occupy the sidewalk and dig an area, and it can be occupied, and the area dug and secured without danger to the public, then the encroachment made on the street is reasonable, and the work lawful. But in every improvement like the one we are considering, it is essential that every possible precaution should be used against danger. No precaution whatever was used in this case. The area was left uncovered, without guards and lights to warn those who passed by, and a serious accident was the result. If an area is left open it is dangerous, and is a nuisance, and can be abated. *Dygett* vs. *Schenck*, (23 Wend., 446); *Congreve* vs. *Morgan & Smith*, (18 N. Y., 84); *Storrs* vs. *City of Utica*, (17 N. Y., 108); *Coupland* vs. *Hardingham*, (3 Campbell, 398).

The City must be reimbursed unless it has been itself in fault. The rule of law is, that one of two joint wrong doers cannot have

contribution from the other. It is difficult in this case to see how the City was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the City to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the City, that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger, and the City from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the City is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the City for his wrongful act. The City gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was lost, and it became unlawful, the City is not in fault. We can see no justice or propriety in the rule, that would hold the City under obligation to supervise the building of an area such as this.

But the defendant maintains "that the owner of a lot who employs a competent and skilful contractor (exercising an independent employment) to erect a building on his lot, is not liable to third persons for injuries happening to them by reason of the negligence of such contractor in the prosecution of the work," and that this area was not such a nuisance as rendered him liable. How far owners of real estate, or personal property,

are answerable for injuries which arise in carrying into execution that which they have employed others to do, has been a subject much discussed in England and this country since the case of *Bush* vs. *Steinman*, 1 Bos. & Pul., 404. All the cases recognize fully the liability of the principal where the relation of master and servant, or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes. We are not disposed to question the correctness of the rule contended for by the defendant, as an abstract proposition. The rule itself has, however, limitations and exceptions, and we cannot see that it is applicable to this case.

"If the owner of real estate suffer a nuisance to be created, or continued, by another on or adjacent to his premises, in a prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons." *Clark* vs. *Fry*, (8 Ohio State Rep., 359); *Ellis* vs. *Sheffield Gas Consumers' Co.*, (2 Ellis & Black, 75 Eng. C. L., p. 767).

This area when it was begun was a lawful work, and if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large City and left without guards and lights at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered.

It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not therefore liable; but the digging this area necessarily resulted in a nuisance—was the result of the work itself—unless due care was taken to make the area safe.

This is a clear case of "doing unlawfully what might be done

lawfully; digging earth in a street without taking proper steps for protecting from injury." *Newton* vs. *Ellis*, (85 Ellis & Black. 58 Eng. C. L., 123).

"If the owner of real estate builds an area in front of his store, he must at his peril see that the street is as safe as if the area had not been built." *Congreve* vs. *Morgan & Smith*, (18 N. Y., 84).

The privilege of making the area was a special favor conceded to Robbins alone, as the owner of the lot, and "it is a familiar principle that when one enjoys a privilege in consideration that no one alone can enjoy the benefit, he is required to use extraordinary care in the exercise of that privilege." *Nelson* vs. *Godfrey*, (12 Illinois, 20).

Robbins, in the exercise of his privilege, did not use even ordinary care. There is no provision in his contract with Button, nor with the men who laid the flagging, or put on the iron grating, that they should provide proper lights and guards. What Button failed to do, by which he is chargeable with negligence, does not appear in the evidence. And Robbins, although repeatedly warned, and having daily supervision over the work by his architect and superintendent, suffers this nuisance to be continued. A case of grosser negligence could hardly be imagined. In the heart of a large City, the owner of a valuable lot, being desirous of adding to the value of a large iron building that he is about to erect by the license (to be inferred, not expressed,) of the corporation, digs an area; leaves it open, without guards or lights; fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it by his superintendent, and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, and continued, insists that he is not in fault; that if blame attaches anywhere, it is to his contractor. If the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

In the cases which were cited by the defendant's counsel, and relied on, was the case of *Hilliard* vs. *Richardson*, (8 Gray, 349),

and the case of *Scammon et al.* vs. *The City of Chicago,* (25th Ills., 424).

Hilliard vs. *Richardson* was a most elaborate and able discussion of the *respondeat superior,* and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the Court arrived. But that case and the one at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter at an agreed sum to repair it, and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot and an accident happened. The teamster, when he placed boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly not held liable, and one of the grounds on which that Court place their decision was, "that it was not a nuisance erected by the owner of the land, or by his license, to the injury of another."

The case of *Scammon* vs. *The City of Chicago,* is similar in many of its facts to this case, and is decided differently. That Court held, as we do, that if the "nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he should alone be responsible." But the Court also held that "the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work," a rule to which we cannot assent, and which we think is opposed by reason and authority.

It was urged at the bar that this Court, in such cases, follows the decision of the local Courts.

Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts.

But where private rights are to be determined by the application of common law rules alone, this Court, although entertain

ing for State tribunals the highest respect, does not feel bound by their decisions.

Testing the question of the correctness of the charge of the Judge of the Circuit Court to the jury, by the rules and principles we have discussed and established, was there or not error in it?

The following language was used by the Judge in his charge, and was excepted to by the City: "If, then, the contractors were in possession and control of the premises, with their servants and agents, and were, in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it." This instruction, in a case where the facts warranted, might have been properly given. But it did not arise out of the facts of this case; was inapplicable to them; was calculated to confuse and mislead the jury on the question of Robbins' liability; and must have misled them, and should not have been given.

A broad rule was laid down, when the very case itself furnished an exception.

Robbins' duty was absolute to see that the area, dug under his direction and for his benefit, should be safely and securely guarded, and failing to do so, his liability attached, and the jury should have been told so.

The City also excepted to so much of the said charge of the Court, as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury.

The City was not in fault, and this exception was properly taken.

The judgment below is reversed, with instructions to award a *venire de novo.*

WARD ET AL. *vs.* CHAMBERLAIN ET AL.

1. The power of the Supreme Court of the United States to revise the proceedings of a Circuit Court in a case brought up on a certificate of division is strictly confined to the questions stated in the certificate.
2. Judgments and decrees rendered in the Courts of the United States are liens upon the defendant's real estate in all cases where similar judgments or decrees of the State Courts are made liens by the law of the State.
3. A decree for the payment of money in an admiralty suit *in personam* stands in this respect upon the same footing as a decree in equity.
4. Judgments and decrees in equity, rendered by the State Courts of Ohio, are, by the laws of that State, liens upon lands; *Therefore*,
5. Where one party filed his libel against another in the Federal District Court for Ohio, claiming damages by a collision of two vessels on the Lake and got a decree *in personam* for money as compensation, the decree is a lien on the respondent's land.
6. That lien gives the libellant a right to levy on the lands to which it attaches and consequently such interest in the lands as will enable him to sustain a bill of discovery against the respondent and any third person who sets up an unfounded claim under a different lien.
7. On such a bill, the respondent, if he makes out his case, is entitled to a decree which will remove the cloud from his title, but the Court cannot proceed further, and in the same case order the land to be sold for the payment of the debt found due by the original decree.

This case came up on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Ohio.

The complainants, on the 12th day of November, A. D. 1856, upon appeal from the District Court, obtained a decree in the

Circuit Court of the United States for the Southern District of Ohio, against the defendants, Philo Chamberlain and John H Crawford, in a proceeding by libel for damages sustained by the libellants by a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libellants, and the propeller Ogdensburg, belonging to said Chamberlain and Crawford, whereby the steamer was sunk and lost:

The case was taken by appeal to the Supreme Court of the United States, and the decree of the Circuit Court there affirmed.

On the 7th day of July, 1859, a joint decree was entered in said Circuit Court, upon the mandate of the Supreme Court, and by the agreement of the parties, against Chamberlain and Crawford, and also against the defendants, I. L. Hewitt, John H. Chamberlain and George W. McNeil, their sureties in the appeal to the Supreme Court of the United States. It was stipulated and agreed between the libellants and the defendants in the last-named decree, that Philo Chamberlain and John H. Crawford, the original defendants in the libel should make certain payments periodically on account of the last-named decree, that if such payments should be punctually made, no execution should issue; but that in default of any such payment being made as required by the agreement, the complainants might thereupon proceed to collect the amount due and unpaid, as they should see fit. Two payments were made and two defaults afterwards occurred: complainants caused execution to issue upon the decree, against the goods and chattels, lands and tenements of the defendants therein; the Marshal found no goods or chattels whereon to levy, and for want of such goods and chattels he levied upon the lands of the defendants, situated in the Northern District of Ohio, and described in the bill. The other defendants claimed rights and interests in, and liens upon said lands. The defendants had no goods or chattels liable to execution, and no lands or tenements in the State of Ohio, other than those levied upon and described in the bill. The prayer of the bill was, for discovery, that the rights of the parties and the dates and validity of their several liens in respect of said lands might be ascertained, that the lands might be sold and the proceeds

applied, so far as could of right be done, to the payment of the amount due, and for general relief.

To this bill the defendants filed a general demurrer.

A hearing was had on the questions raised by the demurrer in the Circuit Court at the July Term, 1860, and the opinions of the Judges being opposed, the questions were certified to this Court for decision.

The points of law upon which the Circuit Court divided are distinctly set forth by Mr. Justice Clifford in the opinion of this Court.

Mr. Newberry, of Ohio, for Complainants.

Mr. Spalding, of Ohio, for Defendants.

Mr. Justice CLIFFORD. This is a bill in equity, and the case comes before the Court on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Ohio. According to the transcript the bill of complaint sets forth that the complainants, on the 12th day of November, 1856, upon appeal from the District Court of the United States, obtained a decree in the Circuit Court for the Southern District of Ohio for the sum of $36,000 against the two respondents first named, in a proceeding by libel, filed in the District Court on the 27th day of October, 1852, for damages sustained, as alleged in the libel, by means of a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libellants, and the propeller Ogdensburg, belonging to the aforesaid respondents, whereby the steamer was sunk and lost. Complainants also allege that the case was taken by appeal to this Court, and that the decree of the Circuit Court was here affirmed; that on the 7th day of July, 1859, when the mandate of this Court was received and filed in the Circuit Court, a joint decree, by the agreement of the parties, was entered there against the original respondents and their sureties on the appeal to this Court; that the parties to the last named decree stipulated and agreed between themselves that the

original respondents should make certain payments at stated times on account of the decree, and that if such payments were regularly and punctually made, no execution should issue on the decree, but that they also stipulated and agreed that in default of any such payment as required by the agreement, the complainants might thereupon proceed to collect the amount due and unpaid as they should see fit.

They also allege that two payments of $1,000 each were duly made under the stipulation and agreement, but that the aforesaid respondents subsequently made default, and when a second default had occurred, the complainants caused execution to issue upon the last named decree against the goods and chattels, lands and tenements of the respondents in that decree, and delivered the same to the Marshal, and that the Marshal, finding no goods or chattels of the execution debtors, and for want of such, levied the execution upon certain parcels of land belonging to them, situated in the Northern District of Ohio, and which are particularly described in the bill of complaint. Rights and interests in, and liens upon the lands are claimed by the other respondents, as the complainants allege, in regard to which they, the complainants, are not particularly advised; and they also allege that the respondents owned the lands levied upon and described in the bill of complaint at and before the time of the rendition of the first named decree, and have so owned the same ever since that time, and that they have no other lands or tenements in the State, and have no goods or chattels liable to execution.

Prayer of the bill of complaint is for discovery, and that the rights of the parties and the dates and validity of their several liens in respect of the lands may be ascertained, and that the lands may be sold and the proceeds applied so far as can of right be done, to the payment of the amount due upon the decrees and for general relief. To the bill of complaint the respondents in the decrees demurred and the complainants joined in demurrer, thereupon the following questions of law occurred before the Court, in regard to which the opinions of the Judges of the Court were opposed.

1. Whether either of the decrees was a lien upon the real estate of the respondents therein who owned such real estate as aforesaid.

2. Whether an execution can be issued upon a decree in admiralty in Ohio against the lands of the respondents, they having no goods and chattels liable to execution to satisfy the same.

3. Whether the issuing and levying of the execution in this case, as aforesaid, were not nullities, and whether the levy of the execution in anywise bound the lands upon which the same was levied.

4. Whether real estate can be reached by proceedings in chancery to satisfy a decree in admiralty in Ohio, where the respondent has no goods or chattels liable to execution.

I. Provision is made by the Act of the 29th of April, 1802, that whenever any question shall occur before a Circuit Court, upon which the opinions of the Judges shall be opposed, the point upon which the disagreement may happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the Judges, and certified under the seal of the Court, to the Supreme Court at their next session to be held thereafter, and shall by the said Court be finally decided. 2 Stat. at Large, 156. Such certificate, as has repeatedly been held by this Court, brings nothing before this Court for its consideration but the points or questions certified, as required by the 6th section of the act. Defective certificates are sometimes sent up, but in such case the Court uniformly refuses to certify any opinion, and remands the cause for further proceedings, holding, under all circumstances, that nothing can come before this Court, under that provision, except such single definite questions as shall actually arise and become the subject of disagreement in the Court below, and be duly certified here for decision. *Ogle* vs. *Lee*, (2 Cran., 33); *Perkins* vs. *Hart's Exr.*, (11 Whea., 237); *Kennedy et al.* vs. *Georgia State Bank*, (8 How., p. 611.) All suggestions, therefore, respecting any supposed informality in the decree, or irregularities in the proceedings of the suit, are obviously premature and out of place, and may well

be dismissed without further remark; because no such inquiries are involved in the points certified, and by all the decisions of this Court matters not so certified are not before the Court for its consideration, but remain in the Court below to be determined by the Circuit Judges. *Wayman* vs. *Southard*, (10 Whea., 21); *Saunders* vs. *Gould*, (4 Pet., 392.) Such other matters, undoubtedly, may be brought here for revision by another certificate of division in an opinion like the present, or by an appeal after final judgment, but nothing of the kind is here now for the consideration of the Court.

II. Recurring to the questions certified in the transcript, it is obvious that the first three involve the same general considerations, and present the important inquiries—1. Whether a decree in admiralty for the payment of money, rendered in a Federal Court, in a suit *in personam* under the circumstances stated, is a lien upon the lands of the respondents in the decree, and, if so, then—2. Whether an execution issued on the same may, for the want of goods and chattels of the execution debtor, be lawfully levied on his real estate. Libellants, under the 21st rule in admiralty, adopted at the last session of this Court, may have a writ of execution in the nature of a *fieri facias* in all cases of a final decree for the payment of money, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulator. Execution, however, was issued upon the decree described in the bill of complaint in 1860, before the present rule was adopted, and while the old rule adopted in 1845 was in operation. By that rule it was provided that the libellant might, at his election, have an attachment to compel the defendant to perform the decree or a writ of execution in the nature of a *capias*, and of a *fieri facias*, commanding the Marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. Authority was given to the Courts of the United States, by the 17th section of the Judiciary Act, to make and establish all necessary rules for the orderly conducting of business in the said Courts, provided

such rules were not repugnant to the laws of the United States; and by the 7th section of the Act of the 2d of March, 1793, additional authority was conferred upon the several Courts of the United States to make rules and orders for their respective Courts directing certain prescribed proceedings, and other matters in the vacation, and otherwise in a manner not repugnant to the laws of the United States, and to regulate the practice of said Courts respectively for the advancement of justice, and to prevent delays in the proceedings. 1 Stat. at Large, pp. 83, 335.

Full power and authority were also given to this Court by the 6th section of the Act of the 23d of August, 1842, to prescribe, regulate, and alter the forms of writs and other process to be used and issued in the District and Circuit Courts, and the forms and modes of framing and filing libels, bills, answers, and other pleadings and proceedings in suits at common law, or in admiralty and in equity, pending in those Courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and of proceeding to obtain relief, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice of the said Courts so as to prevent delays and promote the other objects specified in the section. 5 Stat. at Large, 518. None of those provisions, however, authorize this Court to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an Act of Congress. Remarks are to be found in the opinion of the Court in *Beers et al.* vs. *Haughton*, (9 Pet., 360), which give some countenance to that theory, but the remarks were not necessary to the adjudication of the matter in controversy, and evidently should be understood as referring to the examples previously mentioned in the opinion of the Court, where process had been modified to make it conform to State laws adopted by rule of Court. Congress, say the Court, may adopt such State laws directly or by substantive enactment, or they may confide the authority to adopt them to the Courts of the United States: and the Judge who delivered

the opinion, in enforcing the preposition, went on to say that the Courts may by their rules not only alter the forms, but the effect and operation of process, both mesne and final, so that it may reach property not before liable, or may exempt property previously subject to such process.

Explained as above, the remarks are perhaps without objection, but it cannot for a moment be admitted that any rule adopted by this Court, merely as such, can enlarge, diminish, or vary the operation and effect of mesne or final process upon the property of the debtor in respect to the matter under consideration. Although a lien on land constitutes no property or right in the land itself, still it confers a right to levy on the same to the exclusion of other adverse interests acquired subsequently to the judgment, and when the levy is actually made on the land affected by the lien, the title of the creditor generally relates back to the time of the judgment, so as to cut out intermediate incumbrances. *Conrad* vs. *The Atlantic Ins. Co.*, (1 Pet., 443); *Massingill* vs. *Downs*, (11 How., 767.) Different regulations, however, prevail upon the subject in different jurisdictions, and in some of the States neither judgments nor decrees for the payment of money, except in cases of attachment on mense process, create any preference in favor of the creditor until the execution issuing on the same has been duly levied on the land. Reference is made to these various regulations as confirming the proposition that rules of Court can have no effect to create such a right, or to displace it where it has been conferred by the Legislature.

III. Two errors, as was supposed, existed in the old rule, and it was on that account that it was abolished and the new one was substituted in its place. Arrest of the body of the debtor was improperly allowed, and the remedy of the creditor against the property of the debtor was improperly restricted. 5 Stat. at Large, pp. 321, 410; 4 Stat. at Large, 281. Repeal of the old rule corrected one of the supposed errors and the new rule was adopted to correct the other, so that the practice of the Admiralty Courts upon both subjects might conform to the existing provisions of law. Such were the views of the Court at the time the alteration was made in the rule, but it is insisted by the

respondents that decrees in admiralty, although rendered in suits *in personam* and for the payment of money, are not in any case a lien on land under the laws of Congress. They do not deny that judgments and decrees in equity, for the payment of money, are a lien on land in the State of Ohio; nor that, by the laws of Congress, such judgments and decrees in the Federal Courts follow in that respect the laws of the State in which the same were rendered or pronounced.

Argument in support of the first proposition is certainly unnecessary, because it is the subject of express legislation. Code, sec. 421; Swan's Stat., 675. Laws to that effect were passed at a very early period in the history of the State, and they appear to have been continued to the present time. Repeated decisions of this Court also have established the doctrine, that the lien of judgments and decrees in the Federal Courts arises out of the adoption of the State laws upon that subject, and that the lien may be considered as a rule of property under the thirty-fourth section of the Judiciary Act. *Clements* vs. *Berry*, (11 How., 411); *United States* vs. *Morrison*, (4 Pet., 124); *Ralston* vs. *Bell*, (2 Dall, 158). To the same effect, also, is the decision of Mr. Justice Grier, in *Lombard* vs. *Bayard*, (1 Wall, Jr., 96), wherein he held: "1. That the lien of judgments in the Courts of the United States does not result from any direct legislation of Congress on that subject. 2. That under the Judiciary Act, which ordains that the laws of the several States shall be the rules of decision at common law, the Courts of the United States" have uniformly adopted the principles of State policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as rules affecting real property, and its transmission, whether by descent or purchase. Regarding those propositions in the form first stated as settled and undeniable, nothing remains for consideration on this branch of the case except to inquire and ascertain whether or not decrees in admiralty for the payment of money stand upon the same footing as decrees in equity; for if they stand upon the same, then it is clear that the first three questions must be

answered in the affirmative, and if not, then they must be answered in the negative.

4. Expressions are to be found in one or more of the cases referred to which countenance the idea that the State laws in respect to the lien of judgments and decrees were adopted by the Courts of the United States, but upon a closer examination of the subject it will appear, we think, that those laws are recognized and substantially adopted by the Acts of Congress regulating process in the Courts of the United States. Authority was given to all the Courts of the United States by the 14th Section of the Judiciary Act to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Provision was also made by the 2d Section of the Act of the 29th of September, 1789, that the forms of writs and executions, except their style and modes of process, should be the same in each State, respectively, as were then used or allowed in the Supreme Court of the same; but it was provided that the forms and modes of proceedings in causes of equity and admiralty and maritime jurisdiction should be according to the course of the civil law. Power to issue process, mesne and final, was conferred upon all the Courts of the United States by the first provision, but the forms of process in suits at common law and the forms and modes of proceedings in equity and admiralty and maritime causes were prescribed by the second. Discrimination was made between suits at common law and suits in equity and admiralty, but the forms and modes of proceedings in the two latter were referred to the civil law. Expiring, as the last named Act did, at the end of the next session after which it was passed, further legislation became necessary, and Congress accordingly passed the Act of the 8th of May, 1792, confirming the forms of writs, executions, and other process then used in the Courts of the United States in suits at common law, but declaring, in effect, that the forms and modes of proceeding in suits of equity, and in those of admiralty and maritime jurisdiction, should be according to the principles, rules, and usages

which belong to Courts of Equity and to Courts of Admiralty, respectively, as contradistinguished from Courts of common law. Certain exceptions are specified in the same section, and the whole provision is made subject to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same. (1 Stat. at Large, 276).

Two cases at least came before this Court involving the construction of that provision and its validity. Those cases among other things affirm: 1. That the States have no authority to control or regulate the proceedings in the Courts of the United States, except so far as the State Process Acts are adopted by Congress, or by the Courts of the United States under the authority of Congress. 2. That the foregoing provision adopted the forms of writs, executions, and other process of the States as existing in 1789. subject to such alterations as the Courts of the United States might make, but not subject to alterations since made in the State laws. 3. That the laws of the United States authorize the Courts of the Union so to alter the form of the process of execution then used in the State Courts as to subject to execution lands and other property not then subject to execution by the State laws in force at that time. *Wayman* vs. *Southard* (10 Whea., 41, 43); *Bank of U. S.* vs. *Halstead*, (10 Wheat., 63). In enforcing the third proposition, Mr. Justice Thompson in the last case said it is understood that it has been the general, if not the universal, practice of the Courts of the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the State Courts, and under such alterations many sales of land have no doubt been made which might be disturbed if a contrary construction should be adopted. Both of those cases were decided in 1825, and at the same term this Court held, in the case of *Manro* vs. *Almedia*, (10 Whea., 490,) that the proceedings in cases of admiralty and maritime jurisdiction, under the beforementioned Process Act, were to be according to the modified admiralty practice of our own country, and that it was not a sufficient objection to the issuing of the process of attach-

ment that it had fallen into disuse in the parent country. Such was the state of the decisions of this Court when the Act of the 19th of May, 1828, was passed. 4 Stat. at Large, 278. Regulation of mesne process is the subject of the first section, commencing with the forms of mesne process in suits at common law in the Courts of the United States held in those States admitted into the Union since the date of the first process act. Forms of mesne process in those Courts are required to be the same in each of the said States respectively "as are now used in the highest Court of original and general jurisdiction of the same." Separate provision is also made in the same section in respect to the forms of mesne process in proceedings in equity and in those of admiralty and maritime jurisdiction. Repetition of those regulations is unnecessary, as they are substantially the same as those of the former act, except that the regulations relate solely to mesne process. Right of imparlance also is made, by the second section of the act, to depend in certain cases upon State laws. Where judgments are a lien upon the property of the defendant, and where, by the laws of the State, defendants are entitled in the Courts thereof to an imparlance of one term or more, the provision is that the defendants in actions in the Courts of the United States, holden in such State, shall be entitled to an imparlance of one term. showing that it was the intention of Congress to prevent a creditor suing in the Federal Courts from obtaining an advantage over another creditor suing in the State Courts. Bearing in mind that the first section of the act under consideration has respect solely to the forms of mesne process in the several Courts of the United States, and that the provision specifies and prescribes the source from which the forms of such process shall be derived in suits of admiralty and maritime jurisdiction, as well as in suits at common law and in equity, we come to the examination of the third section of the same act, which provides that *writs of execution* and other final process issued on judgments *and decrees* rendered *in any of the Courts* of the United States, and the *proceeding thereupon* shall be the same, except their style, in each State respectively, as are now used in the Courts of such State, saving to the Courts of the United States

in those States in which there are not Courts of Equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of Court.

Courts of justice may construe a legislative provision but they cannot repeal what is expressly enacted. When Congress, in plain and unambiguous terms declares that writs of execution on decrees rendered *in any of the Courts of the United States*, and the proceedings thereupon, shall be the same as are now used in the Courts of such State, it is not possible for this Court to hold that the decrees of one of the Courts of the United States are not embraced in that provision; especially not, as the very Court whose decrees it is said are excluded from the provision is specifically mentioned in the first section of the same act as one of the Courts of the United States, and its proceedings there made the subject of special and material regulation. Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the District Courts of the United States, but the Circuit Courts hear such cases on appeal, and, as matter of daily practice, render decrees thereon for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provision under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the District Courts. Undoubtedly Congress intended by that provision to adopt the State laws in respect to the proceedings on final process as they existed at the date of the act, and the effect of the enactment, or one of its effects, was to render judgments and decrees for the payment of money rendered in the Federal Courts a lien on the land of the debtor in all cases and under like circumstances as when rendered in the State Courts. Under the earlier process acts this Court twice decided that the laws of the States furnished the rule of decision in respect to the lien of judgments and decrees rendered in the Federal Courts upon the land of the debtor, and since the passage of the act under consideration it has been twice affirmed by this Court as a matter of history that the act was passed to confirm the view expressed in those decisions. *Beers et al.* vs. *Haughton*, (9 Pet., 361); *Ross et al.* vs. *Duval*, (13 Pet., 64).

Perfect coincidence of opinion upon the subject appears to have prevailed throughout between Congress and the Court, and on all sides apparently the endeavor has been to assimilate the proceedings in the Federal Courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the Courts of the States. Strong confirmation as to the views of Congress upon the subject is derived from the 4th section of the Act of the 4th of July, 1840. 5 Stat. at Large, 393. By the fourth section of that act it is provided, that judgments and decrees hereafter rendered in the Circuit and District Courts *within any State*, shall cease to be liens on real estate or chattles real in the same manner and at like periods as judgments and decrees of the Courts of such State now cease by law to be liens thereon. District Courts, as is well known, exercise no jurisdiction in equity; so that the inference is a very strong and indeed a conclusive one, that the reference to decrees, so far as that Court is concerned, is solely to decrees in admiralty for the payment of money.

Imprisonment for debt also and the computation of interest upon judgments in all civil cases, both in the Circuit and District Courts, are by Acts of Congress expressly referred to the laws of the State for the rule of decision and the ascertainment of the rights of the parties. 5 Stat. at Large, pp. 320, 410, 515. Usage, however, it is said, is opposed to such a construction of the provisions under consideration, and reference is made to authorities to show that in England an execution issued on a decree in the admiralty never runs against the land of the debtor, which may well be admitted, but the reason for the restriction must not be overlooked, which is, that Courts of Admiralty in that country are not regarded as Courts of Record. Under the Constitution, the judicial power of the United States is vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Such judicial power extends to all cases of admiralty and maritime jurisdiction, as well as to the cases of law and equity described in the Constitution.

When the judicial system of the United States was organized

exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was conferred upon the District Courts. Appeals in certain cases were allowed to the Circuit Court, but neither an admiralty or an equity cause could be brought here from the Circuit Court in any other mode than by writ of error. 1 Stat. at Large, 83. Later regulations allow appeals, but they place causes in equity, and admiralty and maritime jurisdiction, upon the same footing. 2 Stat. at Large, 244.

Circuit Courts, as well as District Courts, were created by the Act of Congress establishing the judicial system of the United States, and the latter as well as the former are Courts of Record. No one ever doubted the fact, and consequently it is not necessary to enter into any argument to prove it. These considerations lead necessarily to the conclusion that the answer to the first three questions must be in the affirmative.

5. Before proceeding to answer the fourth question submitted, it becomes necessary to advert very briefly to the state of facts bearing upon the point as exhibited in the transcript. Execution was issued on the decree in favor of the complainants, and the marshal duly levied the same upon the several parcels of land described in the bill of complaint. They are, therefore, interested in the title to the subject-matter in controversy, and inasmuch as the statement of the case shows that rights and interests in and liens upon the lands of a conflicting character are claimed by the other parties, they, the complainants, were entitled to the discovery and to so much of the relief prayed for as has respect to the ascertainment and determination of the rights and interests of the parties and the dates and validity of their liens upon the said lands. Equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the way of an effectual assertion of his rights in a Court of law. Such interference cannot be sustained unless the complainant shows some title or interest in the land: but it makes no difference whether such

title or interest was acquired by the levy of an execution issued on a judgment at law, or on a decree in equity or admiralty for the payment of money. Complainants' rights and remedies are precisely the same as they would have been if the execution levied on the land had been issued on a judgment at law or a decree in equity for the payment of money. Jurisdiction in equity to remove a cloud from the title of the complainant is fully maintained by the modern decisions of the Courts, and so generally is the principle acknowledged, that all doubt upon the subject may be considered as put at rest. 1 Story Eq. (8th ed.) secs. 700, 705; *Hamilton* vs. *Cummings*, (1 John. Ch. R., 522); *Pettit* vs. *Shepherd*, (5 Paige Ch. R. 501).

Where the respondents claimed an unfounded lien on certain real estate of the complainant, and it appeared that such claim prevented purchasers of the estate from making payment of the stipulated price, it was held in *Chipman* vs. *Hartford*, (21 Conn., 488), that the complainant was entitled to a discovery and to have the cloud removed from his title; and, in enforcing that conclusion, the Court say that where an instrument is outstanding against a party which is void, or an unfounded claim is set up, which he has reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, it is a well recognized principle that equity will interfere and grant the appropriate relief. *Downing* vs. *Wherin*, (19 N. H., 91); *Tanner* vs. *Wise*, (3 P. Wms., 296); *Overman* vs. *Parker*, (1 Hemp., 692); *Clark, et al.*, vs. *Smith*, (13 Pet, 203); *Lounsbury* vs. *Purdy*, (18 N. Y., 515). Applying these principles to the present case it is clear that the complainants were entitled to a discovery and to have the cloud removed from their title, but equity will not interfere under the circumstances stated, to decree that the lands shall he sold and the proceeds applied as prayed in the bill of complaint. Affirmative answers must be certified to the first three questions, and to the fourth, that the complainants, under the demurrer, are entitled to so much of the relief prayed for as has respect to the removal of the cloud upon their title to the land described in the bill of complaint but that the real estate mentioned cannot be reached by proceedings in chancery to satisfy the aforesaid decree.

Mr. Justice GRIER, dissenting.

I feel bound to express my dissent from the majority of my brethren in the opinion just delivered.

It is now seventy years since the establishment of Courts of Admiralty in these States, yet it seems that the boundary line of their jurisdiction is not yet settled. During all this time it has never been supposed that the definitive sentence or decree of a Court of Admiralty was a lien or could be levied on lands. The dominion of the Admiral was over the sea—the ships and men who frequented it—their contracts and their torts. His Court proceeded either against the ship or the person of the owner, by arrest of the thing or the person. When either was arrested, they could be released by entering into stipulation with approved sureties (*fide jussoux,*) who consented that execution should issue against their goods and chattels in case of default.

There is no process known to Courts of Admiralty for seizing or selling land. But it is said that this process is authorized by the process Act of March 19, 1828.

It is now thirty-five years since that act was passed, and now for the first time, it has been alleged that this provision lay hid within its sections. The twenty-first rule regulating the practice in admiralty, made by this Court in 1845,—seventeen years after the passage of the act,—shows that this Court had then no suspicion of the hidden meaning of the third section, which has now been brought to light. If they had supposed that this statute had made lands subject to lien by the decree of a Court of Admiralty, they would have devised some process for taking them in execution and selling them. The first section of the act ordains that the forms of mesne process, &c., should be the same in Courts of common law as are used in the highest Courts of original and general jurisdiction of the States; and in equity according to the rules and usages which belong to Courts of Equity; but "in those of admiralty jurisdiction, according to the principles, rules and usages of admiralty as contradistinguished from Courts of common law."

The third section, which directs process of execution, speaks

of judgments and decrees in any of the Courts of the United States, and ordains that it shall be the same except in their style, as now used in the Courts of such State. Now as there are no Courts of Admiralty in any State, to what rule was the process of Courts of Admiralty to conform? Is it to those of these Courts of Common Law or Equity? The act provides that in States where there are no Courts of Equity, the process may be prescribed by rules of Court.

The whole argument of this new construction of this section is founded on the word "*any*," which is construed in its most expansive sense, in spite of consistency in the act, and the evident intent of the legislation, as exhibited in the whole statute.

This innovation in the jurisdiction of Admiralty Courts introduces a lien, unknown to the laws of any State.

The lien of judgments is a rule of property, which it is beyond the power of this Court to establish. Congress has been careful not to attempt the exercise of such a power; and only adopts the State rules in cases where, if the judgments or decrees had been in a State Court, they would have operated as a lien. Congress never intended by this oblique way, to create, what would in fact be, (to a large portion of every State,) secret liens.

I believe that the construction which this act has received for thirty-five years past is the true one, and beg leave to protest against this introduction of a new one, which utterly disregards "the principles, rules and usages of Courts of Admiralty as contradistinguished from a Court of law."

I am confident such was not the intent and meaning of Congress. The result of this doctrine may be, to bring us into conflict with the State Courts, who may refuse to recognize titles to land obtained through the process of Maritime Courts.

Mr. Justice CATRON joined with Mr. Justice Grier in the dissent. The other Judges concurred in the opinion of Mr. Justice Clifford.

TRUSTEES OF THE WABASH AND ERIE CANAL COMPANY vs. BEERS.

1. Where the Legislature of a State authorized Commissioners to borrow money to be used in making a canal and for the redemption of the loan pledged the canal itself, its tolls, rents and lands, the lien of a lender under such act cannot be divested or postponed by a subsequent act of the Legislature.
2. The holder of bonds given for money advanced under such a law has a security for his debt which is protected by that provision in the Constitution of the United States which forbids a State to pass any law impairing the obligation of a contract.
3. The bondholder does not lose his lien on the lands and revenues of the canal by surrendering other bonds of a later issue and of inferior security and taking canal stock and other bonds of the State in place of them.
4. The holder having a legal security incapable of being defeated without his consent, his surrender of one class of bonds, raises no presumption either of law or fact that he intended to give up his rights under the bonds which he kept.
5. Where a lien creditor brings a bill in behalf of himself and other creditors of the same class, and with similar rights, the decree should provide proper relief for all of them.

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Usher, of Indiana, for Appellants.

Mr. Gillet, of Washington City, for Appellees.

Mr. Justice MILLER. This is an appeal from a decree of the Circuit Court of the United States for the District of Indiana.

The Government of the United States having granted to the State of Indiana certain lands to aid in the construction of a canal, designed to unite the waters of Lake Erie with those of

the Wabash river, that State caused the route to be surveyed and located, and an estimate to be made of the cost of construction, which was calculated at the sum of $1,081,970.

On the 7th day of January, 1832, an act was passed, which approved and adopted this survey and estimate, established a Board of Canal Commissioners, and authorized them to borrow the sum of $200,000, to be used in making said canal. The fifth section of this act is as follows: "That for the payment of the interest, and redemption of the principal of the sums of money which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be and are hereby irrevocably pledged and appropriated, all the moneys in any manner arising from the lands, donated by the United States to this State, for the construction of said section of said canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof, as finished; the sufficiency of which for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee."

Under this act there were issued two hundred bonds for one thousand dollars each, two of which are held by complainant in this suit; and the decree which was rendered in his favor, was for the interest due and unpaid on them.

In 1834, the Legislature authorized another loan of $400,000, for the benefit of the canal, for which the act again pledged the canal and the lands granted by the Federal Government, and the State guaranteed the sufficiency of the security.

In 1835, by another act, the Legislature contracted a third loan of $227,000, for the benefit of the canal. But for this it did not pledge the canal, but only the faith of the State.

In 1836, a law was passed providing for a general system of internal improvement, which authorized the State to borrow ten millions of dollars, for which sum, in gross, she pledged her

canals, railroads, turnpikes, and the tolls and water rents arising from them; and by the tenth section of that Act an additional loan of $500,000 was authorized for the benefit of the canal, for which the canal, its lands and resources, were again pledged as security.

Of some one of these later loans, probably the ten million loan, as they are called internal improvement bonds, the plaintiff became the owner of thirteen bonds, of $1,000 each.

Under the pressure of the large debt contracted by this last act, and of the general financial distress which followed shortly after it was created, the State found herself unable to pay the interest on her bonds, her credit seriously impaired, and her citizens weighed down with heavy taxation. In this state of her affairs, she came forward in 1846 with a propostion to her creditors, which is to be found embodied in the Act of January 19th, 1846, and the Supplementary Act of January 27th, 1847.

The principal features of these acts, so far as they concern our present purpose, are, that the bonded debt of the State, except its bank stock bonds, should be equally divided between the State and the Wabash and Erie Canal; that the bonds then out should be surrendered, and in place of them the holders should receive one-half in State stock certificates, bearing five per cent. interest; and for the other half, Wabash and Erie Canal stock certificates, bearing the like rate of interest. For the security of the payment of the latter, the act provided that the entire canal, its lands, revenues, and property of every description, should be conveyed to trustees, whose powers and duties were therein prescribed. As a means of completing the canal and rendering it productive, the parties who surrendered their bonds and received stock certificates in lieu thereof, were required to pay ten per cent. on the amount of the new certificates for that purpose. For this the Act also gave them a lien on the canal and its revenues in the hands of the trustees. These statutes were not to take effect until $4,000,000, which was about half of the bonds of the State, were surrendered; and the canal was not to be transferred to the trustees until $800,000 had been subscribed by holders of certificates for its completion. The

creditors of the State generally accepted this arrangement. The necessary amount of bonds was surrendered to give effect to the act, and the necessary sum was subscribed to authorize the transfer of the canal to the trustees. The plaintiff surrendered his thirteen bonds of the issue of the Act of 1836, and paid his subscription of ten per cent., but he did *not* surrender his two bonds issued under the Act of 1832, nor does it appear that any bonds of that issue were surrendered.

It is claimed by counsel for appellant, that $981,970 of bonds of the *same class* of the two retained by plaintiff were surrendered. This is founded on the idea, that of the bonds issued under the Acts of 1834, 1835, and the 10th section of the Act of 1836, so many are to be considered as entitled to the security provided by the Act of 1832 as will make up with the $200,000 first issued, the estimated cost of the work mentioned in the latter act. It is difficult to see how this can be maintained, if it be in any way material to the determination of the case. The bonds which were issued under these acts seem very clearly to depend on the respective acts under which they were issued, for any lien they may have had, on the canal, its lands and revenues, and not on the Act of 1832; and the Act of 1835 gave no lien at all on the canal or anything appertaining to it, but in place thereof pledged the faith of the State for the payment of the debt and interest. The purchasers of these bonds understood it so no doubt, for it appears from the record, that while all of the bonds issued under acts subsequent to 1832 were delivered up, and stock certificates received for them, none of the $200,000 of that issue was so surrendered. But one reason can be imagined for this, namely, that the security for those first issued was sufficient, and the holders of them did not believe they could improve their condition by an exchange for stock certificates, while the holders of the latter bonds believed that with the $200,000 lien prior to theirs, they *would* improve their condition by taking the State for one-half the debt and the canal stock certificates for the other half. We think their conclusions were sound, and that these several loans were liens of which the

first was paramount, and the others entitled to preference in the order of their date.

If then these bonds were a lien on the canal, its lands and revenues, paramount to all others, the Legislature of Indiana, (whatever it may have designed to do,) could not divest that lien or postpone it to others, because it was the result of contract, and was protected by the provision of the Constitution of the United States against impairing the obligation of contracts. This is not controverted, but it is said that plaintiff, by his own act, has done that which the Legislature could not do; in delivering up his thirteen bonds, which were either no lien or at most a secondary one, and receiving the canal stock certificates for half of them and State stock certificates for the other half, and by payment of the ten per cent. on them required by the law. This idea is strongly urged by counsel for appellant. It is the only ground going to the merits on which plaintiff's right to a decree is resisted, and we have given it our full consideration. It presents itself in two aspects, each of which is entitled to a separate examination. It is said first, that by the acts above mentioned, the plaintiff established a relation between himself and other parties who had made a like surrender of bonds and a like advance of money, which makes it an act of bad faith in him to assert in this suit, his right to priority of payment for these bonds, when the result will probably be to deprive those who took the canal certificates of all hope of payment, either for the certificates, or for the money advanced to complete the canal.

If the parties had stood in all respects in the same attitude towards the fund, which was their common security at the time of these transactions, and the plaintiff were now seeking to appropriate that fund to the payment of his debt exclusively, there would be great force in the argument. But such was not the case.

The plaintiff held a double relation to that fund. He had, in common with certain persons, a debt, which was a first and paramount lien on it, and he had, in common with certain other persons, a debt which was no lien, or if a lien, only

secondary, and of little value. In common with all those who held the prior lien he refused to surrender it. In common with those who held the other debts he surrendered his, and united with them in such arrangements as were supposed to be for their mutual benefit. There was no concealment of his interest in the debt which had the prior lien, nor of the existence of that lien. The number and character of the bonds which were liens on the canal were matters of public record, accessible to every body, and all prudent men must have acted in these matters in reference to their existence. It could make no difference to the parties who took the certificates of stock for these bonds, in whose hands the prior lien was found. Its amount and its validity were the same, whether in the hands of one who had surrendered other bonds, or of those who had surrendered nothing. We do not attach any importance to the idea that other persons may have been influenced by his example to surrender their bonds, so long as there is no evidence that he used undue persuasion, or made improper representations.

If we were at liberty to inquire into the motives which induced parties to surrender their bonds, and pay their ten per cent., they would probably be found quite consistent with a recognition of plaintiff's right under his prior bonds. The security which they had was manifestly of little value. The canal was incomplete. It paid no interest, and as matters then stood would probably never pay any of the interest or principal By surrendering these bonds they received State stock for half the amount, for which the State pledged her integrity to provide by taxation, payment of both interest and principal. By advancing $800,000 it was believed that the canal would be completed, and rendered productive property, and if so, it was expected to pay off all the bonds of the issue of 1832, and then remain ample security for the $800,000 advanced, and for principal and interest of the canal stock certificates. These calculations seemed likely to be justified by the result, until the wonderful multiplication of railroads ruined the canal by competition It was a common effort on the part of those who had the inferior class of bonds to make a security which was not

satisfactory, yield as much as possible; and the fact that one of those had a paramount security on the same fund known to the parties, cannot certainly be called an act of bad faith in him since he risked his last investment as they did; nor can we perceive that the failure of the scheme, by events not foreseen by any one, should deprive him now of the rights which he then reserved.

But, in the second place, it is maintained that the effect of the Acts of 1846, and 1847, when so far complied with as was necessary to put them in force, was to destroy all liens on the canal which were not protected by them, and that no protection was afforded in any case, unless the bonds were surrendered and the new security taken. And while it is conceded that if plaintiff had remained entirely aloof, the act could not have had that effect as to him, it is insisted that his surrender of thirteen bonds, and acceptance of the stock certificate for them, must be held to imply his assent to all the provisions of these acts, including those which destroy his priority of lien for his two bonds of 1832.

If any such implication arises from the transaction, it must be one of law, and not of fact; for it would be absurd to suppose that while he consented to the destruction of his security for those two bonds, he failed to surrender them, and get the faith of the State for one-half, and a lien on the canal for the other. Such a presumption must be one of those necessary legal presumptions which the law will not allow to be disproved by any evidence whatever.

So far as he surrendered bonds and received certificate of stock for them, it is beyond doubt that he accepted all the provisions which related to those bonds; but any presumption that he consented to waive other rights, must be based on the ground that the acceptance of those certificates was incompatible with the assertion of his rights in reference to the bonds which he did not surrender. Those statutes did not require that all persons who held bonds should surrender them, nor that all who did so should surrender all they had. They provided that those who *chose* to do so might deliver up their bonds and accept

the certificates of stock, but nothing was obligatory on the State or the creditors until $4,000,000 of bonds were surrendered. When that event occurred, the arrangement was binding. But to what extent? We can see no reason for saying it was binding beyond the extent of the bond so exchanged, as between the State and the parties to the transaction. In regard to the State, as to his associates in the matter of the subscriptions, the plaintiff held a two-fold relation; and the fact that he agreed to accept for his thirteen bonds a certain compromise, can scarcely be said to afford an implication, incapable of refutation, that he abandoned his claim under the two other bonds. Nor do we perceive that his surrender of thirteen bonds, and payment of $1,300 toward the completion of the canal, was inconsistent with his retaining and insisting on his lien for the other two bonds of a different class.

It is unnecessary, however, to pursue this branch of the inquiry further, because we are satisfied that neither the Act of 1846, nor the supplementary Act of 1847, were in anywise intended to destroy the priority of lien which belonged to the Wabash and Erie Canal bonds, so called. This phrase is applied in the Act of 1847, to the bonds issued under the Acts of 1832, 1834, 1835, and the $500,000 issued under the 10th section of the Act of 1836. In all of those Acts, except that of 1835, the canal was pledged as security for the bonds, and the State guaranteed the sufficiency of the security. In section eight of the Act of 1846, in which the power is given to the Governor to convey the canal to the trustees, and which also goes on to provide in five distinct sub-sections, for the order of payment out of the canal fund, there is this very clear and explicit declaration: After describing the manner of conveyance, and what is to be conveyed, including the canal and all its resources, these words are added: "Subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto."

In the supplemental Act of 1847, section 10, the order of distribution of the funds arising from the canal resources is some-

what changed, but after the ninth and last paragraph on that subject there is this language:

"And it is hereby declared, that such sums shall from time to time be paid and applied as soon as conveniently may be after the receipt thereof, *saving the just rights of the holders of bonds now outstanding, known as the Wabash and Erie Canal bonds as provided in the eighth section of this Act.*"

We cannot resist the conviction that these provisions were intended to preserve the lien which the bond-holders of this class had, notwithstanding the transfer of the canal to other hands, for other purposes. The bonds for which the State had guaranteed that the canal was a sufficient security, certainly constituted an "existing right and equity against the State," on account of the canal, and a "liability of the State growing out of it." And no where more appropriately than in an Act transferring the canal to other hands, for other purposes, could the State recognize distinctly the lien which it had created, and the sufficiency of which it had guaranteed. What were the just rights of holders of bonds outstanding and known as the Wabash and Erie Canal bonds in January, 1847? Certainly, speaking in reference to the canal fund, of which that Act was making a disposition, their right was to have it appropriated to the payment of the accruing interest on these bonds, and the bonds themselves when due, according to their priority of lien. A very ingenious argument is made by the learned counsel for the appellant, to show that these provisions were not intended to apply to this lien, and we are referred to the case of *the State* vs *Board of Trustees*, (4 Ind. R., 495), to support that view. But that case, as we understand it, decides nothing more, than that the holder of one of these bonds who had surrendered it for a canal stock certificate, had a right to have his interest paid out of the funds arising from that part of the canal east of Tippecanoe river, before it was appropriated to the completion of the canal to Evansville, under the provision of the Act of 1846.

Our construction of these acts is supported by the facts that the State could not destroy the lien if it had designed to do so, that it was reasonable and just that she should protect a lien

the sufficiency of which she had guaranteed, and that the plain and natural import of the language used, justifies this interpretation of the legislative intent.

We are, therefore, of opinion, that the bonds on which plaintiff brought his suit, were a paramount lien on the canal, its lands and revenues, from the mouth of Tippecanoe river to the east line of the State, and that said lien has not been impaired by any Act of his, or of the State, and that the decree in his favor was right on the merits.

It is made a point in the case, that the bill should be dismissed for want of proper parties.

The plaintiff brings his suit in behalf of himself, *and all others interested in the same issue of bonds.* As we have already said, there seems to be no other bonds, which are liens, outstanding, but those of the issue of 1832, all the holders of which are made plaintiffs.

The various creditors of the fund, who have become so since the transfer of the canal property to the trustees, and the holders of the canal stock certificates, whose interest remains unpaid, are fairly and fully represented by those trustees. They come within that class of persons who have an interest in the object of the litigation, but need not be made parties because they are so represented. See Story Eq. Pl., section 141, 142, 143. Mitford's Eq. Pl., 174. Calvert on Parties to Suits in Equity, top page 17, side page 25. *Van Vechten* vs. *Terry*, (8 John. Chy. R., 197).

But plaintiff has brought his suit in behalf of himself and other bond-holders of the same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue, are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, yet the decree makes no provision for them. This we think is error.

The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bond-holders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to

ascertain who these bond-holders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, on paying their proportion of its expense.

For this purpose the case is remanded to the Circuit Court, with instructions to proceed in accordance with this opinion.

CHILTON *vs.* BRAIDEN'S ADMINISTRATRIX

1. Purchase-money is treated by Courts of Equity as a lien on the land sold where the purchaser has taken no separate security, and this is on the principle that one who gets the estate of another should not in conscience be allowed to keep it without paying for it.
2. This rule applies with as much force to the case of a purchase by a married woman as to any other case.
3. The disabilities imposed upon married women are intended for their protection, and the law will not allow them to be used as the means of committing fraud.

Appeal from the Circuit Court of the United States for the District of Columbia.

The appellee, Margaret Lyons, administratrix of Elizabeth Braiden, deceased, on February 12th, 1857, filed her bill in the Circuit Court of the District of Columbia for the sale of part of square No. 226, in the City of Washington, to enforce the payment of the purchase money due therefor, against Agnes R. Hazard, a married woman,—who had purchased on the credit of her separate estate. O. E. P. Hazard, her husband, and Sam'l Chilton, her trustee, were joined with her as defendants.

The bill sets forth the sale of the property to Agnes R. Hazard —as shown by the recitals of the deed—the conveyance to Chilton, as trustee for her—and avers that the purchase money is due and unpaid. Mrs. Hazard filed her answer, admitting the sale and conveyance, but denying that "the sum of $6,000 re-

mains due and unpaid," and "she shows to the Court that she fully satisfied the said Elizabeth in her life time with the said purchase money, and, in proof thereof, she exhibits with her answer, and will prove it when it shall be necessary to do so, the receipt of the said Elizabeth to her, bearing date the 12th day of September, 1856, whereby she acknowledged the payment to her, said Elizabeth, of the sum of five thousand eight hundred and fifty dollars in full of respondent's purchase of house and lot of her, sold on the 21st March, 1856,"—she cannot state when, where, or how, the said purchase money was paid and satisfied to said Elizabeth Braiden,"—"she cannot state positively, of her own knowledge, that any sums of money were paid to her," and contends "that it is not material whether or not the whole amount of the sum of $6,000 was paid said Elizabeth, if she voluntarily gave a receipt in full." In this answer she relies on the *receipt* entirely, not stating any specific amount as having been paid. She denied the allegation of the bill, that her separate estate had no real existence, but failed to answer the interrogatories propounded mainly for the purpose of showing that she could not have paid for the property from her separate estate. Exceptions being filed, the Court required her to answer the interrogatories. In her amended answer, she says some payments were made, but she does not know how much, "the whole matter being conducted by her husband, who held her separate estate." She again set up the *receipt* as an absolute defense. In answer to interrogatories she declared that she did not know how much was paid by her husband. The husband also answered, and so did the trustee. The plaintiff filed the general replication. The cause was set for hearing. The controversy was, whether or not the purchase money had been satisfied and discharged, which necessarily involved the genuineness of the receipt.

The Court directed issues to be made up and tried before a jury on the law side of the Court. A jury was duly impanneled, and found for the plaintiff *that the receipt set up was not the genuine receipt of Elizabeth Braiden.*

The cause coming on for final hearing, the Court passed a

decree that all the purchase money was due and ordered a sale of the property for the payment of it. The case came before this Court on an appeal from that decree.

Mr. Carlisle, of Washington City, for Appellants

Mr. Stone, and *Mr. Bradley,* of Washington City, for Appellee.

Mr. Justice GRIER. When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that Courts of Equity proceed as between vendor and vendee. The purchase money is treated as a lien on the land sold, where the vendor has taken no separate security. In the present case this lien has not been defeated by alienation to a *bona fide* purchaser, or any subsequent lien of creditors. The issue taken in the answer concerning the respondents' ability to pay out of her separate estate is wholly immaterial except to give probability to the allegation that she had paid the consideration. The only defense taken in the answer to the claim of the bill is an alleged receipt in full or discharge for the purchase money.

The deed does not acknowledge the payment of the consideration, and the answer admits that no consideration was paid at the time of its delivery. The issue between the parties turned wholly on the genuineness of a receipt or discharge purporting to have been executed and delivered by Elizabeth Braiden on the 12th of September, 1856. The Court ordered an issue to try this question at law, and the jury found "That Elizabeth Braiden did not execute and deliver said receipt or discharge, and that it was not the genuine receipt of said Elizabeth Braiden." The Court, in the exercise of their discretion, refused to grant a new trial of this issue. As it appears to us that the evidence justified the verdict, we see no error in the decree of the Court. It did not condemn the defendant to pay the consideration out of her separate estate, but orders the houses to be sold to pay the purchase money, unless before a certain time the defendant shall pay the amount due.

Neither the answer of the party, nor the argument of counsel, allege any good reason, why a married woman should be permitted to take property without paying for it, more than another. The disabilities thrown round her by the law, are for her protection—not to enable her to commit fraud.

Decree affirmed, with costs.

CURTIS'S ADMINISTRATRIX *vs.* FIEDLER.

1. An importer from whom a collector exacted illegal duties could not under the Act of 1839, maintain assumpsit to recover back the excess, unless the suit was brought before the officer paid the money into the treasury.
2. The Act of 1845 gave the right of recovering back, such excessive duties to all importers who had paid or might thereafter pay them, under protest in writing, with the grounds of objection distinctly set forth.
3. Whether this latter act, has a retroactive operation, so as to include the case of a person, from whom excessive duties were exacted before its passage. *Quere?*
4. But it is certain, that a party whose claim for excessive duties is not recoverable under the Act of 1839, and who seeks to recover under the Act of 1845, cannot avail himself of the latter statute, without bringing himself within its terms, by showing that he made proper protest at the time of payment.
5. A party imported iron and hemp at the same time, entered them together, and made a general protest against the duties charged in the entry, without discrimination of the packages and stating no ground of objection, except that the charge was illegal. *Held*, That such a protest utterly fails to meet the requirements of the Act of 1845.
6. The importer must indicate by his protest, the distinct and definite ground of his objection to the charge, and show his intention to reclaim the excess.
7. This distinctness is required, that the officers may know to what amount of risk and responsibility they expose the Government by taking the duties in the face of the objection.

Error to the Circuit Court of United States for the Southern District of New York.

Ernest Fiedler, a merchant of New York, in September, 1842, imported into the port of New York, from St. Petersburgh, Russia, in the ship "Nicholas Savin," a quantity of unmanufactured hemp. He also imported at the same time, by the same vessel, a quantity of iron in bars.

The Tariff Act of August 30, 1842, which was in operation at the time of the importation, contained the following provision in respect to the duty to be levied on hemp: "On manufactured hemp *forty* dollars per ton; on manilla, sunn, and other hemps of India, on jute sisal, grass, coir, and other vegetable substances, not enumerated, used for cordage, *twenty five* dollars per ton." *Tariff Act of* 1842, sec. 3, sub. 3.

Edward Curtis, at that time Collector of the Port of New York, treated this hemp as unmanufactured hemp and charged upon it a duty of $2,575.38, being at the rate of $40 per ton. The duties thus charged upon the iron amounted to the further sum of $848.56. The importer protested against the payment of the duties thus charged on the entire importation. The protest was in writing upon the margin of the entry, which embraced both the hemp and the iron, and was as follows: "*I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty. Sept.* 1, 1842." No other protest against or objection to the payment of the duties was made by or on behalf of the plaintiff. The duties were paid to the collector, *September* 6, 1842, and by him paid into the Treasury of the United States.

The plaintiff afterwards, in November, 1847, brought the action of *assumpsit* to recover the difference between the amount of duties charged and paid on the hemp specified in the entry at the rate of $40 per ton and the amount calculated at the rate of $25 per ton, the difference claimed being $965.77. The defendant pleaded *non assumpsit.*

At the trial, before Mr. Justice Nelson and a jury, the above facts were proved, and the plaintiff claimed that under articles 6 and 11 of the Treaty between the United States and Russia, of

December 6th and 18th, 1832, the exaction of any duty on the hemp in question beyond $25 per ton was unauthorized and illegal. The Articles of the Treaty thus relied on, are as follows: "*Article* 6. No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States, than are, or shall be payable on the like article, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article, the produce or manufacture of the United States or of Russia, to or from the ports of the United States, or to or from the ports of the Russian Empire, which shall not equally extend to all other nations."

"*Article* 11. If either party shall, hereafter, grant to any other nation, any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional."

The plaintiff grounded his right to recover on this: that the Treaty with Russia fixed the duties on hemp imported from that country at the rates imposed on the same articles from any other country, and inasmuch as the tariff of 1842 imposed only $25 per ton on India hemp, no higher duty could be legally charged on Russian hemp.

The plaintiff called witnesses to prove that Russian and Manilla hemps are known in trade and commerce as "hemp," and serve substantially the same purposes, being all used in the manufacture of cordage, &c. On the part of defendant it was proved and admitted by plaintiff's counsel, that all the hemps of India are the products, not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees.

The defendant asked the Court to instruct the jury as follows:

First. That the present action of assumpsit cannot be maintained inasmuch as by the 2d section of the General Appropria-

tion Act of the 3d of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required to pay, and did pay, such moneys into the Treasury of the United States, and that the Act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, *retroactively*, to subject defendant in his individual capacity to such action.

Secondly. That the present action cannot be maintained, inasmuch as defendant acted in precise conformity to the Tariff Act of August 30th, 1842, by which a duty of $40 per ton was laid on all manufactured hemps (except the hemps of India); that as between the defendant as collector and plaintiff as importer, the amount of duties to be paid was conclusively fixed by the said Act of Congress. That the question whether or not the discrimination made by the said Act of August 30th, 1842, between the hemps of India and other unmanufactured hemp, was, in respect to Russian hemp, an infraction of the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the Government of Russia and the Government of the United States, and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor for the judicial tribunals to decide, any such question.

Thirdly. That the present action could not be maintained because the protest of the plaintiff, dated September 1st, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question, nor did it discriminate between the duties so charged on such hemp and the duties charged on the iron included in the entry; but, on the contrary, the said protest referred to all the duties charged in the said entry—those charged on the iron equally with those charged on the hemp, and placed the objection to the payment thereof on the ground that there was no law authorizing their exaction.

Fourthly. That upon the true construction of the Tariff Act of the 30th of August, 1842, all hemps, wherever produced, and

even though produced in India, which are the products of the *cannabis sativa*, are charged with a duty of $40 per ton, and the lesser duty of $25 per ton is limited to hemps not the products of *cannabis sativa*, but of other and different plants or trees; and that therefore the discrimination made in favor of such hemps of India was not an infraction of the Treaty with Russia.

The Court refused to give the instructions so requested by the defendant, but directed the jury, that if they found from the evidence that the hemps of India were, at the time of the passage of the Tariff Act of 1842, generally known in trade and commerce as unmanufactured hemps, the plaintiff was entitled to a verdict for the amount claimed by him; and in accordance with that view the verdict was rendered and judgment given. The defendant took this writ of error.

Mr. Butler, of New York, and *Mr. Coffey*, of Pennsylvania, for Plaintiff in Error.

These actions of *assumpsit* cannot be maintained, even were it admitted that the moneys sought to be recovered were illegally exacted by the defendants as duties on the hemp in question.

1. When such moneys were received by the defendants, they were bound by the Act of 3d March, 1839, to pay them into the treasury, and did so pay them; and if liable to any action for the recovery thereof, they were not liable to an action of assumpsit for that purpose. 5 U. S. Statutes at Large, 348, sec. 2; *Cary* vs. *Curtis*, (3 Howard, 236).

2. The Act of the 26th of February, 1845, (5 U. S. Statutes at Large, 727,) should not be construed to operate, and cannot operate *retroactively*, to subject the defendants in their individual capacity to an action to which they were not before liable.

But if it be conceded that the Act of the 26th of February, 1845, (5 Stat., 727,) restores the right of persons who have paid money to collectors for duties under protest, to bring suit against the collectors to test the legality of such payments, which right had been taken away by the Act of 3d March, 1839, (5 Stat., 348, sec. 2,) and the ruling of the Supreme Court in *Cary* vs. *Curtis*, (3 How., 236,) a fatal objection to these actions still

exists. In restoring this right of action, the Act of 1845 subjected it to this condition: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It is now said by the defendant in error, in *Curtis* vs. *Fiedler*, that this law was not in existence when the duties in that case were paid, and that, therefore, it cannot have a retroactive effect to require the protest to conform to its terms. But the plain and perfect answer to this objection is, that by virtue of the Act of 3d March, 1839, the defendant in error had no right of action at all against the collector at the time he paid the duties and made his protest, in September, 1842. The opinion of the Court in *Cary* vs. *Curtis* established the validity of that act, and showed that it utterly destroyed the right to recover in assumpsit against the collector for duties paid under protest, (the form of remedy adopted in this case.) His right of action was therefore entirely created by the retroactive operation of the Act of 26th February, 1845, which declared that nothing in the Act of 1839 should be construed to take away or impair the right of any person or persons *who have paid*, or shall hereafter pay money for duties under protest to any collector, &c., to maintain any action at law against such collector, &c. And in the same section is contained the clause above quoted, declaring that *no action* shall be maintained, &c. unless the said protest *was* made in writing. Surely the condition which is thus appended to the right of action is as operative as the clause which confers that right. The right depends on compliance with the condition; and if the protest of the defendant in error did not happen to conform to the requirements of the condition, then no right of action was given to him. If he has any remedy at all, it is that provided by the Act of 1845, and that was given him only on condition that his protest was made in accordance with its terms. He cannot invoke the retroactive remedy, and discard the retroactive condition on which it is given.

If, therefore, the protest made by the defendant in error, when he paid the duties, was not in substantial accordance with the terms of the Act of 1845, the Court below erred in overruling the third point of the plaintiff in error, and in allowing the action to be maintained.

The custom-house entry of merchandise, on which the protest was written, embraces a charge for 1,835 bars of iron, hammered, and for 50 and 15 bundles of hemp, no discrimination being made as to the class of duties protested against.

The ground of objection to the payment of the duties upon which this action is attempted to be sustained, is, that as the treaty with Russia of December, 1818, stipulates that no higher rate of duties shall be imposed on goods imported from Russia than on like articles imported from other places, the duty rate of $40 per ton imposed by the Tariff Act of August 30, 1842, on unmanufactured hemp, should not have been charged on the hemp imported by the plaintiff, Fiedler, and described in the entry of the 1st of September, 1842, but the duty rate of $25 per ton, imposed by the same Tariff Act on manilla, sunn, and other hemps of India, &c., should have been charged on it, and that the plaintiff has a right to avail himself in this action of that provision of the Russian treaty, to recover the amount of duties thus illegally paid.

It is contended that under the protest filed, it was not competent for the plaintiff below to raise this question, and that the Court below erred in overruling the third point of the defendant below, and in entering judgment for the plaintiff.

The requisites of the protest prescribed by the Act of 26th February, 1845, as above cited, as a condition of the maintenance of an action against a collector to recover duties paid under such protest, are, that the protest shall be "made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

The object of Congress in requiring not only the objection, but the *grounds* of objection, to be distinctly and specifically set forth, has been fully explained by the Courts of the United

States; and the numerous cases in which the sufficiency of protests under this Act have been examined by the Judges of this Court, show beyond question that the protest in this case is fatally defective.

Mason vs. *Kane*, Maryland Circuit Court, April Term, 1851, cited 2 Blatchford C. C. R., 390); *Warren* vs. *Peaslee*, (2 Curt. C. C. R., 235); *Kriesler* vs. *Morton*, (1 Curt. C. C. R., 413); *Norcross* vs. *Greely*, (1 Curt. C. C. R., 114); *Swanston* vs. *Morton*, (1 Curt. C. C. R., 294); *Burgess* vs. *Converse*, (2 Curt. C. C. R., 294); Same case, (18 How., 413); *Thompson* vs. *Maxwell*, (2 Blatch. C. C. R., 385); *Pierson* vs. *Lawrence*, (2 Blatch. C. C. R., 495); *Pierson* vs *Maxwell*, (2 Blatch. C. C. R., 507); *Focke* vs. *Lawrence*, (2 Blatch C. C. R., 508); *Cornett* vs. *Lawrence*, (2 Blatch. C. C. R., 512) *Wilson* vs. *Lawrence*, (2 Blatch. C. C. R., 514); *Tucker* vs. *Maxwell*, (2 Blatch. C. C. R., 517).

Tested by the rules applied in these cases, the protest filed by Fiedler is insufficient to maintain this action. The only objection set forth is that "there exists no law authorizing the exaction of said duty."

The entry on which the protest is written contains a charge for duty on hammered bars of iron, and charges on bundles of hemp. The protest fails to state whether the objection to the payment of duties applies to that charged on the iron, or to that charged on the hemp, or to both. It is said in *Warren* vs. *Peaslee*, (2 Curt. C. C. R., 235,) that "the grounds of the objection to the particular payment sought to be recovered back, must be, not only distinctly, but specifically set forth, and that it must be applied to that particular payment." It is impossible that the collector could learn from this protest what particular payment of the duties charged on the entry was objected to, whether to that charged on all or on a part of the entries enumerated. It is true that the protest is broad enough to cover all, and it is true, as the plaintiff's counsel argue, "that the whole includes a part." But it is precisely that vague generality which the act meant to prohibit. The protest, as is said in *Thompson* vs. *Maxwell*, must, "by positive and direct notice, point out every particular of fact and law;" and as is said in *Swanson* vs. *Morton*, "must show

distinctly *what* is objected to." If the object of the law be to give notice to the collector of the specific objection, so that, if possible, he may remove its cause, and also to confine the pro testant on the trial, to the ground of objection set forth in his protest, then this protest fails in both particulars, for it does not inform the collector *where* the illegality is, and, of course, is not in such form as to limit the importer, on the trial, to any specific ground, since he may then apply his objection either to the charges on the iron, or to the charges on the hemp, at his pleasure.

The protest is also defective in this, that it covers the *whole* duty and not the excess on the hemp, of which complaint is now made. The duty charged on the hemp it $40 per ton, and the plaintiff below admits that $25 per ton was legally due, and yet his protest "against the payment of the duty charged in this entry," instead of informing the collector that the objection was to the payment of the duty in excess of $25 per ton, gave him notice in effect that the objection was to the payment of any duty. It should have specified the part of the duty against which he now objects, viz.: the difference between $25 per ton and $40 per ton on the hemp. The objection taken in the Court below to the payment of this part of the duty is, therefore, in this respect substantially different from that taken in the pro test.

The protest is especially defective in this, that it sets forth no *ground* of objection at all. The objection that "no law exists to authorize the exaction of the duty," gives no distinct or specific information, or rather no information whatever of the ground on which the payment of the duties is opposed, It is a form in which any objection to the payment of duties may be clothed. since in every case the ground of recovering duties paid must be, that no law authorized their exaction. It is broad enough to afford a cover for any question that may be raised to the validity of the tariff laws, or the regularity of the proceedings of the custom-house officers; and neither furnishes the collector with knowledge of the alleged wrong, so that, if possible, he may remedy it; nor with the means of restraining the protestant from

selecting, on the trial, any particular ground of objection which subsequent information or reflection may suggest. On such a protest the collector is necessarily ignorant of the wrong complained of, and of the issue which he is to meet on the trial. To sustain this protest would, it is suggested, be to abrogate the statute and overrule all the cases that have been cited.

Mr. Cushing, of Massachusetts, and *Mr. Gillet*, of the District of Columbia, contra.

The Act of March 3d, 1839, requiring collectors receiving money under protest, to pay the same into the Treasury, does not bar the right of recovery in this case.

On the trial, the defendant requested the Court to charge that the action could not be maintained, "inasmuch as, by the 2d section of the General Appropriation Act of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required, and did pay such moneys into the Treasury of the United States, and that the Act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, retrospectively, to subject said defendant in his individual capacity to such action." The Judge refused to give this instruction, and the defendant excepted. (R., p. 14.)

This presents the question, whether the Act of 1839, deprived the plaintiff of his right of action, and continued to do so.

The provision referred to will be found in 5 U. S. L., 348, § 2.

In the case of *Cary* vs. *Curtis*, (3 H., 236), it was held that the provision cited above, protected the collectors from prosecution in cases where they had exacted an excess of duties, and paid the same into the Treasury. Congress being in session when this decision was made, the Act of February 26th, 1845, (5 U. S. L., 727), was passed to remove the obstacle in the way of recovering in such cases, where the importer had been wronged. The Act provided: "that nothing contained in the 2d section of the Act of 1839 shall take away, or be construed to take away, or impair, the right of any person or persons who *have paid* or *shall hereafter pay* money, as and for duties under protest, to any collector of the customs, or other persons acting as such, in order

to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized, or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law; nor shall anything contained in the 2d Section of the Act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

Although the Act of 1839 was held to prevent a recovery, the above Act of 1845 removed the obstacle, and was designed to permit suits for previous exactions. Had not this been so, those previously paying excess of duties would have been remediless because this Act of 1845 prohibits refunding by the Secretary under the Act of 1839. The object of the Act was not to deprive the party of a remedy, but to confer one in entire harmony with the provision of the Constitution in relation to jury trials. Although at the time of this transaction the plaintiff was prohibited from suing, the prohibition was removed, and it became lawful in 1845.

The protest served was sufficient in form, and the collector was bound to take notice of the law protecting the rights of the importer, without its being specified in the protest.

On the trial, the defendant's counsel requested the Court to charge, "that the present action could not be maintained, because the protest of the plaintiff, dated September 1, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question; nor did it discriminate between the duties so charged

on such hemp, and the duties charged on the order included in the entry, to which said protest was attached; but, on the contrary, the said protest referred to the duties charged in the said entry—those charged on the iron, equally with those charged on the hemp—placed the objection to the payment thereof on the ground that there was no law authorizing their exaction." The Judge refused to give this instruction, and exception was taken.

At the time of paying the excess of duties now claimed, the plaintiff made a protest in writing, broad enough to cover his case, which was endorsed on the entry in these words: "I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty."

The defendant now seeks to escape liability, upon the ground that the duties on the iron, and a portion of those charged on the hemp, were authorized by law. His theory is, that the whole does not include a part. Until he demonstrates this, the common axiom must be respected which establishes the opposite conclusion. The protest, although broad enough to cover the duty on the iron, the plaintiff did not seek to apply to that article. To that extent there is no fact proved in the case to which it is applicable.

But as to the hemp on which the defendant charged forty per cent., the protest does apply. The plaintiff claimed that there was no law authorizing that duty. If he was bound to specify the objection, he did so most fully.

But prior to 1845, there was no law requiring the protest to be made in writing, or to specify the objections. The necessity of written protests and specific objections led to the provision in the Act of that date, (5 U. S. L., 727,) which provides:

"Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of the said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.' This was the first law which required the protest to be in

writing, and to specify the particular objection to the payment required.

But this Act cannot be construed to have a retroactive effect, so as to deprive a claimant of a lawful right existing at the time of its passage. The right of the claimant became fixed before the act passed, and he was legally entitled to have his money refunded.

The Act of 1839 was the only obstacle in the way of recovery, and that was removed. To hold that the Act of 1845 required a protest in writing, and of a special character, which was not requisite when the excess of duties was demanded, and could not then be supplied, while it repelled the power of the Secretary of the Treasury to give relief, would be to declare that the claimant was deprived of all possible remedy, when the avowed object of the Act was to confer one of a popular character. Congress had no power thus to devote private property to public use, and deprive the party of all possible means of indemnity. Such was not the intention of Congress, and no such construction can be put upon the Act.

But even under this provision of the Act of 1845, the protest was sufficient. It was made in writing and at the time of paying the duties. It states that there was no law authorizing the collector to demand duties at the rate upon which he insisted—that is, $40 per ton. The question was upon that high rate. The collector demanded it, and the importer objected to paying it. The Act of 1845 did not require the importer to state how much he thought the law authorized the collector to demand. He resisted the exaction of $40 per ton, and the collector insisted upon it, and that was the matter in dispute, and the protest was prepared to meet it.

There was no question of fact involved, to which the importer was bound to call the collector's attention, so that he might examine it and determine it. The question was one of law—to wit: what was the lawful duty upon the hemps of India? The collector was bound to know the law, whether found in the Constitution, a treaty, or statute. He did not need to have his attention specially called to the law. He decided it by declaring

as a matter of law, that the hemps of India were not hemps under the law, and therefore, that the hemps of Russia were not entitled to admission at the rates established for hemps of India; or, he may have decided that the act of Congress repealed or nullified the provision of the treaty. In either event the protest was sufficient. The objection is too technical to be permitted to deprive the party of a legal right which has been conceded to others where no such formalities as a protest are shown.

If the protest required by the Act of 1845 includes and extends to those previously made, it is confidently insisted that the one in question was sufficient.

Mr. Justice CLIFFORD. This is a writ of error to the Circuit Court of the United States for the Southern District of New York. According to the transcript, the suit was commenced by the present defendant against Edward Curtis, in the Superior Court of the City of New York, to recover back an alleged excess of duties paid by the plaintiff upon certain goods and merchandize imported into the Port of New York during the period that the defendant in the Court below was the Collector of the Customs of that port Date of the writ does not appear, nor is it of any importance in this investigation, as the record of the suit was on the 1st day of February, 1847, duly transferred under the 3d section of the Act of the 2d of March, 1833 into the Circuit Court of the United States, where all the proceedings in the suit took place, which are now the subject of revision. 4 Stat. at Large, p. 633. Suit was upon promises, and the declaration contained the common counts as in *indebitatus assumpsit.* Subsequently to the transfer of the record, the defendant, then in full life, appeared and pleaded that he never promised in manner and form as the plaintiff had alleged against him, and upon that issue the parties at the April Term, 1849, went to trial. To maintain the issue on his part, the plaintiff produced and gave in evidence an original entry made by him at the custom-house in the Port of New York on the 1st day of September, 1842, of certain goods and merchandize imported into that port from St. Petersburg, in Russia, in the Russian ship

Nicholay Savin, and which goods and merchandize were duly consigned to the plaintiff by the shipper and owner. Three packages were specified in the entry, of which two consisted of hemp in bundles, and the other of iron in bars, hammered. As described in the entry, one of the packages of hemp contained fifty bundles and the other fifteen. and the package of iron contained eighteen hundred and thirty-five bars.

Unmanufactured hemp by the Act of the 30th of August, 1842, was subject to a duty of $40 per ton, but manilla, sunn, and other hemps of India were subject to a duty of only $25 per ton. These provisions of the Tariff Act under consideration are plain and clear, and by reference to the 4th section of the act it will be seen that iron in bars or bolts, not manufactured in whole or in part, was subject to a duty of $17 per ton. 5 Stat. at Large, pp. 550, 551.

Parties admitted at the trial that the defendant was the Collector of the Port of New York at the time the entry was made, and that he, as such collector, pursuant to the instructions of the Department, charged on the hemp included in the entry a duty of $40 per ton, under the before-mentioned Act of Congress. They also admitted that the duties on the hemp as charged by the collector amounted to $2,575.38, and that the duties charged at the same time on the iron included in the entry amounted to $848.56, making an aggregate charge for duties on the whole importation of $3,423.94. Demand of that amount as the proper charge for the duties on the importation was made by the defendant on the day of the entry, and the plaintiff on the same day protested against the payment of the same in writing, as appears on the margin of the entry in the words following, to wit: "I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty." But the whole sum, notwithstanding the protest, was exacted by the defendant, and the plaintiff accordingly, on the 6th day of the same month, paid the amount charged, and on the same day the defendant paid the same into the Treasury of the United States. Plaintiff insisted at the trial that by virtue of the 6th and 7th articles of

the Treaty between the United States and Russia the hemp included in the entry could only be charged with the same duty as that imposed in the Tariff Act on the hemps of India, because the articles of the treaty referred to stipulate in effect that no higher duty shall be imposed on the produce of Russia imported here than is imposed on the like articles of produce imported from the most favored nations. 8 Stat. at Large, 446.

Evidence was accordingly introduced by the plaintiff tending to show that both the Russian hemp and the hemps of India are known in trade and commerce as hemp, and that both are used in the manufacture of cordage, and serve substantially the same purposes. On the other hand, the defendant proved, or it was admitted, that all the hemps of India are the products not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees, and upon the exhibition of the foregoing proofs both parties rested.

Defendant controverted the position assumed by the plaintiff that the rate of duty could not exceed that imposed by law on the hemps of India, and also insisted that the action could not be maintained against him because the protest of the plaintiff did not set forth any distinct and specific ground of objection to the payment of the duties charged on the hemp, and certainly did not set forth distinctly and specifically any such ground of objection to the payment of the same as that assumed by the plaintiff, or in any manner discriminate between the duties charged on the hemp and the duties charged on the iron included in the same entry, but placed the objection to the payment of the moneys solely on the general ground that there was no law authorizing the exaction.

Prayers for instructions were presented by the defendant, affirming that the hemp was legally chargeable with a duty of $40 per ton, and also embodying the substance of the foregoing objections to the right of the plaintiff to maintain the action, but the presiding justice concurring with the plaintiff upon the merits, refused the requests, and, among other things, instructed the jury that the action might be maintained, although it was an action of assumpsit for the recovery of moneys received by

the defendant for duties paid under protest while the Act of the 3d of March, 1839, was in force, and before the Act of the 26th of February, 1845, was passed, and that the protest in writing of the plaintiff was sufficiently precise and distinct to enable the plaintiff to recover back any portion of the moneys paid for duties on the hemp included in the entry which should appear to have been illegally exacted. Under the instructions of the Court the jury returned their verdict in favor of the plaintiff, and the defendant excepted to the refusal of the Court to instruct the jury as requested and to the instructions given. Judgment was deferred in consequence of a motion for new trial and other proceedings, which need not be noticed until the 17th day of December, 1860, and in the meantime the defendant died, and the administratrix of his estate was admitted to defend.

Three questions arise on this state of the case for the consideration of the Court. First, whether, under the second section of the Act of the 3d of March, 1839, an action of assumpsit on an implied promise can be maintained against a collector of the customs to recover back duties exacted by him in his official capacity after he had received the moneys and paid the same into the Treasury of the United States and if not, then secondly, whether the objection taken at the trial to the payment of the duties was set forth in the protest with sufficient precision and distinctness to bring the case within the provisions of the Act of the 26th of February, 1845, authorizing such a suit in cases where the protest is made in writing and sets forth distinctly and specifically the grounds of objection to the payment. 5 Stat. at Large, 727. Thirdly, whether the legal rate of duty upon the hemp included in the entry was the sum exacted by the collector or only $25 per ton as assumed by the plaintiff.

I. Recurring to the second section of the Act of the 3d of March, 1839, it will be seen that it provides in effect that the money paid to any collector of the customs after the passage of that Act for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasury of the United States, to be kept and disposed of as all other money paid for duties; and it expressly

provides that such money "shall not be held by the collector to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid." 5 Stat. at Large, 348.

Prior to the passage of that act, it had frequently been held that an action of assumpsit would lie against a collector to recover back duties illegally exacted by him of the importer; but this Court held in *Cary* vs. *Curtis*, (3 How., 236,) that the provisions of that section where the money had been paid into the Treasury of the United States were a bar to any such action to recover back duties paid subsequently to the passage of that act. Some of the judges dissented on the occasion, but the concluding portion of the opinion given by the Court rests, it is believed, upon the solid foundations of reason and justice. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. Such a promise, say the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were required to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. Applying that rule to the present case, it is quite obvious that the answer to the first question presented must be in the negative. Importers however were not without remedy under that Act but when

over it was shown to the satisfaction of the Secretary of the Treasury that more money had been paid to the collector for such duties than the law required, it was made his duty to draw his warrant upon the Treasurer to refund the over payment.

II. Congress, on the 26th of February, 1845, gave a different construction to that provision, and provided in effect that "any person or persons who have paid or may hereafter pay money" under protest, as and for duties not authorized by law, to any collector of the customs in order to obtain the goods or merchandize imported by him, may maintain an action at law against such collector to ascertain and try the legality and validity of such demand and payment, but the same section also provides to the effect that no such action shall "be maintained against any collector to recover the amount of duties so paid under protest unless the said protest was made in writing * * * setting forth distinctly and specifically the grounds of the objection to the payment thereof. When the duties in this case were paid the provision just recited was not in existence, and it is insisted by the plaintiff that it cannot have a retroactive effect so as to require the protest of the plaintiff to conform to its terms; but if that be so, then it is clear that the defendant must prevail in the suit, as the plaintiff has no right of action whatever against the defendant unless it be by virtue of that provision. His importation was made while the Act of the 3d of March, 1839, was in operation, and when he paid the duties in question, importers in such cases, according to the decision of this Court, had no right of action whatever against the collector of the customs. Those who had no right of action under the old law cannot rightfully complain of the terms and conditions annexed to the remedy given in the subsequent Act of Congress. All such as have claims falling within it have a right to avail themselves of its provisions, because the right of action given is in its nature a remedy against the Government, but they must accept it as such with its conditions.

Protests according to that law must be made in writing, and must be signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of the

objection to the payment as before stated. Parties who have made such protests upon the payment of duties were placed upon the same footing with those who should thereafter make such protests, and all such were authorized to seek their remedy in an action at law against the collector as the representative of the Government, but it cannot for a moment be admitted that a party can have the benefit of an Act of Congress unless he shows that his case is within its provisions. No allusion whatever is made in the protest to any such ground of objection to the payment of the duties as that taken at the trial, nor any other except the general objection already stated. Unless the grounds of objection to the payment of the duties are distinctly and specifically set forth in the protest it is plain that it cannot be held to be sufficient without a departure from the express requirement of the Act of Congress under which the suit was brought.

Iron in bars, as well as hemp in bundles, is included in the entry, and yet the protest is "against the payment of the duty charged in the entry" without any discrimination as to the packages, and consequently applying as well to the iron as to the hemp, and to the whole amount of the duties charged upon the entire importation. No pretence is now made that the duty charged upon the iron was illegal or excessive, and the plaintiff concedes that the hemp was subject to a duty of $25 per ton. Irrespective of authorities, therefore, it is impossible to hold that the protest in this case is sufficiently distinct and specific to admit the objection to the payment set up at the trial. Numerous decisions have been made upon the subject, but there is not one of them that affords the slightest support to the position that the protest in this case constitutes a compliance with the requirement of the Act of Congress. On the contrary, every one of them affirms the rule that the importer must at least indicate in his protest distinctly and definitely the source or ground of his complaint, and his design to make it the foundation of a claim against the Government. *Greeley's Adm.* vs. *Burgess et al.*, (18 How., 417); *Swanton* vs. *Morton*, (1 Cur., C. C., 294); *Warren* vs.

Peasler, (2 Cur., C. C., 235); *Thompson* vs. *Maxwell*, (2 Blatch. C. C., 391).

Persons importing merchandize are required to make their protests distinct and specific, to apprise the collectors of the customs of the nature of the objections made to the payment of the duties before it is too late to remove them or to modify the charge, and in order that the officers of the Government may know what they have to meet in case they decide to exact the duties, notwithstanding the objection, and expose the Government to the risk of litigation. For these reasons we are of the opinion that the second question presented for the consideration of the Court must also be answered in the negative, and consequently the plaintiff cannot recover in this case. Having come to that conclusion it is unnecessary to consider the question arising upon the merits The judgment of the Circuit Court therefore is reversed with costs, and the cause remanded, with instructions to issue a new venire.

TAYLOR *vs.* MORTON.

1. A case coming into this Court from the Circuit Court on a writ of error, issued under the 22d section of the Judiciary Act, when the record shows that no exception was taken below, is not to be treated like a case with a similar record which comes up from a State Court under the 25th section.
2. In a case which comes from a State Court, under the 25th section, it must appear by the record that some one of the questions stated in that section arose and was determined, otherwise this Court is wholly without jurisdiction and can only dismiss the writ
3. If the cause is brought up from a Circuit Court it is to be either affirmed or reversed, and it will of course be affirmed if the record does not present some ground of reversal.

This was a writ of error to the Circuit Court of the United States for the District of Massachusetts. It was like the case of

Curtis vs. *Fiedler*, (*supra*), an action of assumpsit against a collector of customs for exacting excessive duties on an importation of hemp from Russia. The questions raised and argued in the Court below were the same as those presented to the Circuit Court of New York, in *Curtis* vs. *Fiedler*; but they were decided differently, the verdict and judgment in this case being in favor of the defendant, and it was the plaintiff who took this writ of error. It did not, however, appear from the record that the ruling of the Court, on any question of law, was objected to on the trial, and there was no bill of exceptions which made either the evidence or the instructions of the Court a part of the record.

The same counsel appeared in this cause and in the other, namely:

Mr. Cushing and *Mr. Gillet*, for the Plaintiff below; and

Mr. Coffey and *Mr. Butler*, for the Defendant below.

Both cases were argued together. But on the part of this defendant in error the counsel suggested that the writ of error ought to be dismissed, without considering the questions attempted to be raised by the other side.

Mr. Justice CLIFFORD. This was an action of assumpsit, and the case comes before the Court upon a writ of error to the Circuit Court of the United States for the District of Massachusetts.

Suit was brought by the present plaintiffs against the defendant as the Collector of the Customs for the the Port of Boston and Charlestown, to recover back an alleged excess of duties exacted of the plaintiffs by the defendant on certain unmanufactured hemp imported by them from Russia in 1846. According to the transcript, the action was entered at the May Term, 1847, and was thence continued from term to term to the May Term, 1854, when the parties went to trial upon the general issue. Duties charged on the hemp were $40 per ton, whereas

it was insisted by the plaintiffs that the charge should have been but $25 per ton, because by the 6th and 7th articles of the Treaty between the United States and Russia, it is stipulated to the effect that no higher rate of duty shall be imposed on importations from Russia than on like articles from the most favored nations, and by the Tariff Act of the 30th of August, 1842, the duty imposed on manilla, sunn, and other hemps of India, was but $25 per ton. Evidence was introduced on both sides, but the record states that when the evidence was all in, it was agreed that the case should be taken from the jury and submitted to the Court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence, and that a verdict should be entered and judgment should be rendered for the plaintiffs or defendant, as the Court should think proper upon the law and the evidence.

Accordingly a report of the case was made and signed by the counsel of the respective parties. Whether the parties were ever heard upon this report does not very satisfactorily appear, nor does it appear that any decision was ever made by the Court. On the contrary, the record subsequently states that the *ad damnum* of the writ, on motion of the plaintiff, was increased, by leave of Court, from $2,000 to $2,500; and it also states, among other things, that the case was submitted under instructions from the Court to a jury duly sworn to try the same, who thereupon returned their verdict that the defendant did not promise in manner and form as the plaintiffs have declared against him. Judgment was accordingly entered for the defendant, and the plaintiffs sued out this writ of error and removed the cause into this Court. They did not, however, except to the instructions of the Court, and there is no bill of exceptions in the record, nor is there any assignment of errors of any kind. All that appears is the before-mentioned statement that the case was submitted to the jury under instructions from the Court, but the instructions are not given, and there is no error apparent on the face of the record.

1. When a suit is brought into this Court by a writ of error from a State Court under the 25th section of the judiciary act it

must appear on the face of the record in order to maintain the jurisdiction, that some one of the questions stated in that section did arise in the State Court, and that the question so appearing was decided in the State Court, as required in the same section; and if it does not so appear on the record then this Court has no jurisdiction to affirm or reverse, and the writ of error must be dismissed.

2. But the writ of error in this case was sued out under the 22d section of the judiciary act, which provides in effect that final judgments in a Circuit Court, brought there by original process, may be re-examined and reversed or affirmed in this Court upon a writ of error. Consequently, when a cause is brought into this Court upon a writ of error, sued out under that section, and all the proceedings are regular and correct, it follows from the express words of the section that the judgment of the Court below must be affirmed, although there is no question presented in the record for revision. *Minor et al.* vs. *Tellotson*, (1 Howard, 287); *Stevens* vs. *Gladding*, (19 Howard 64); *Suydam* vs. *Williamson et al.*, (20 Howard, p. 440).

The judgment of the Circuit Court, therefore, is affirmed with costs.

MISSISSIPPI AND MISSOURI RAILROAD COMPANY *vs.* WARD.

1. A public nuisance may be abated on a bill in equity, brought by a private party, who has suffered special damage.
2. It is necessary for the plaintiff in such a bill to show that he has sustained and is still sustaining individual injury by the nuisance.
3. But where the bill is brought in a Federal Court, it is not necessary to show that the plaintiff's damage amounts to the sum which is required to give the Courts of the United States jurisdiction.
4. The jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance.
5. The private party, though nominally suing on his own account, acts rather as a public prosecutor on behalf of all who are or may be injured.
6. If he has partners in the particular business affected by the nuisance, he need not join them as plaintiffs, any more than he need join other persons who have suffered similar injuries.
7. A bill in equity to abate a nuisance is a local suit, and can be brought only in the District where the nuisance is situated.
8. Where the nuisance has been erected, and is maintained by several persons or corporations, those who are not within the jurisdiction of the Court need not be joined as defendants in the bill.
9. In a bill for the abatement of a nuisance brought in the District Court of the United States for the District of Iowa, that Court can exercise no jurisdiction (locally) beyond what a State Court of Iowa might have exercised.
10. The nuisance complained of being a bridge across the Mississippi where that river divides the States of Illinois and Iowa and the State line being in the middle of the river, the District Court for Iowa has no power to abate the nuisance (if it be a nuisance) on the Illinois side.
11. If the obstruction to navigation complained of was created by piers erected on the Illinois side; that was an offence against the laws of Illinois and neither a State Court of Iowa proceed-

ing by indictment, nor the Federal Court for that District sitting in equity can inquire into the facts or furnish a remedy.

12 Inasmuch as the removal of the three piers and three spans of the bridge erected between the middle of the river and the Iowa shore would not materially remedy the nuisance complained of, though it would render the bridge useless, this Court will not affirm a decree which orders such removal.

13 If the removal of that part of the bridge which is within the jurisdiction of the Court, would not improve the navigation of the river, so far as the plaintiff is concerned, he is not entitled to a decree in his favor.

14. In a suit for the abatement of a nuisance, a Court of Equity confining its inquiries within the limits of its local jurisdiction, must be governed by the same rules which a Court of law would act upon in trying an indictment for the same nuisance.

15. The rule of law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves a reasonable space for the passage of vessels, it is not indictable.

16. Another rule is that the bridge must appear plainly to be a nuisance before it can be so decreed; since a Court of Equity, proceeding by bill, like a Criminal Court trying an indictment, must give the benefit of all reasonable doubts to the defendant.

17. The Mississippi river being a boundary between States throughout nearly its whole length, there are judicial difficulties in dealing with nuisances between its shores, which can only be removed by legislation.

Appeal from the District Court of the United States for the District of Iowa.

On the 7th of May, 1858, James Ward filed his bill in the District Court, praying for an abatement of the Rock Island Bridge over the Mississippi river, averring it to be a public nuisance, specially injurious to him as an owner and navigator of steamboats to and from St. Louis, Missouri, to St. Paul, Minnesota. The bill alleged that the Mississippi river is a navigable

stream, the boundary line, in whole or in part, of ten States; that it is used as a channel of commerce and navigated by boats, vessels, rafts, and flat-boats. That steamboats, with other craft in tow, require a space from 120 to 140 feet in width, and, where the bridge is, require the entire width of the river for transit, with at least 60 feet of clear space above for masts and chimneys. Lumber is one of the largest items of transportation, and, by reason of the winds and currents, rafts require the entire unobstructed bed of the river. The navigation of the river is a necessity of trade, and almost the only means of transportation between Wisconsin, Northern Iowa, Minnesota, and the upper Mississippi. The complainant is part owner of certain steamboats plying between St. Louis and St. Paul, and his profits depend upon the safety of the navigation. He avers that he has, by the treaties with France in 1803, the Acts of Congress, and the universal principle recognized by the common law, a right to the free and unobstructed navigation of the river, in all parts of it. He further asserts that the navigation has been interrupted, and rendered dangerous and difficult, by the erection of a bridge from Rock Island, in the State of Illinois, to Davenport, in the State of Iowa; that the river at that point is only about 1,300 feet wide; that it is at the lower end of the Rock Island Rapids, which Rapids are eighteen miles in extent above the bridge, with a fall of twenty-five or thirty feet in that distance; that the current is unusually rapid at that point and difficult of navigation, and that anything in the bed of the river greatly injures the safety of boats, especially in high winds. The bill sets out at length the manner in which the construction of the piers and abutments of the bridge has imperiled navigation and obstructed the stream. The complainant alleges special damage to his own boats, occasioned by the obstruction, the amount, in the instance of one boat, reaching a thousand dollars. Owing to the danger of navigation, he has been compelled to pay largely increased premiums for insurance, occasioned solely by the bridge. The bridge and obstructions were placed in the river by the Mississippi and Missouri Railroad Company, who are made defendants, with the aid and assistance of the Chicago and

Rock Island Railroad Company, and a Bridge Company, created for the purpose of its erection by the State of Illinois, and by the aid of other persons, to the complainant unknown. The Mississippi and Missouri Railroad Company have been hitherto and still are maintaining the said bridge as their own possession, and for their own use and benefit. The said Company, by themselves, or in combination with the other companies named, (which are not within the jurisdiction of the Court,) are about to increase the obstruction in the river, by greatly enlarging the piers of the bridge. The said bridge is a common nuisance now, and the increase of the size of the piers will increase the danger and obstruction, and further hinder and delay complainant's boats in their passage: From the number of disasters, the difficulty of procuring evidence, the expense of preparing for trial, and the peculiarity and diversity of the injuries sustained, suits at law would not compensate for the damage.

The prayer of complainant was: "That on the final hearing of this bill, the Court will order, adjudge and decree, that said bridge was erected in violation of law, and is an obstruction to the navigation of said river, and that the same is a nuisance, and particularly to your orator, and that the said bridge, and the piers thereof, and all material used therein, which injures and obstructs the free navigation of said river, be abated and removed, and the said river be restored to its original capacity for all purposes of navigation."

The defendant in his answer admits that the Mississippi is a channel of commerce, navigated by boats, vessels, &c., and that steamboats sometimes have barges in tow; but denies that they require the space alleged, and avers that the width of boats with their barges does not usually exceed seventy feet, so that the whole width of the river is not necessary to the safe transit of such boats. Denies that sail vessels ever navigate the river. Admits that the amount of lumber rafted down the river is great, but avers that rafts do not usually exceed seventy feet in width, while the piers of the bridge are two hundred and fifty feet apart.

Defendant neither admits or denies the ownership of said

bridge, and avers that if it is so, the joint owners with defendant ought to be made parties defendant herein, and claims the same benefit as though objection had been taken by demurrer for want of proper parties herein; that he has no knowledge or information as to purposes for which said boats were built or the business of complainant; denies that complainant has the right as claimed in all parts of said river; and avers that the right to build a bridge is as sacred as the right of navigation, where no material obstruction is created, and denies that the treaties, Acts of Congress and principles of law prevent the construction of a bridge; denies that the navigation has been obstructed or rendered dangerous and difficult by the erection of a bridge, as alleged; that the water way is one thousand three hundred and twenty-two feet; that the current through the draw in high water is about five miles per hour; that in time of high winds boats were not accustomed to go over the rapids.

The answer describes the bridge minutely, and avers that since its completion in 1856, there have been more than one thousand seven hundred passages of steamboats through the draw, many of them with barges in tow, one with six barges. Defendant admits that the interruption in the flow of water caused by the bridge increases the current flowing past said bridge, but avers that such increase does not exceed the rate of one half mile per hour.

Defendant has no knowledge or information as to any injury to the steamboats of said complainant as alleged, but if either have been so injured they were out of the steamboat channel and negligently and improperly navigated and managed, as the current is straight and direct through the draw on the Illinois side of the draw pier, and if the boats had been put in their proper positions they would have passed through safely.

Defendant has no knowledge or information as to increased rates of insurance.

Admits that the defendant and the Railroad Bridge Company, a body corporate and politic, created by and existing under and within the State of Illinois, by an Act of the Legislature of the

State of Illinois, jointly erected said bridge at the joint and equal cost of said companies, and are the owners thereof, and that the same was permitted and authorized by the laws of the respective States of Iowa and Illinois, and that said parties are using the same as their joint possession and property, and not separated, and for the use and benefit of the passage of the trains of cars of this defendant and the Chicago and Rock Island Railroad Company; and this defendant insists that the said Railroad Bridge Company is a necessary party hereto, and that no decree granting relief as prayed in said bill can be given without materially affecting and destroying the property and interest of said Railroad Bridge Company, and defendant claims the same benefit for want of proper parties as though it had demurred thereto for that cause.

Defendant further alleges, that on the 11th day of June, in the year 1855, the said Railroad Bridge Company, with the assent of this defendant, conveyed by deed of trust or mortgage to Azariah C. Flagg the said railroad bridge and its appurtenances, to secure the payment of four hundred bonds of $1,000 each, made and issued by the said Railroad Bridge Company for the construction of said bridge, and that such deed of trust or mortgage was duly recorded in the Recorder's office of Rock Island County, in the State of Illinois, and in the office of the Recorder of Deeds, in Scott County, Iowa; that such deed of trust is outstanding and in full force; that a decree abating the bridge would entirely destroy the interest held by said Flagg under such mortgage, and this defendant says that said Flagg is a necessary and proper party to this suit, and that a decree as prayed for cannot be made without destroying the interest and property of said Azariah C. Flagg.

Defendant admits that it and the Railroad Bridge Company intended to repair pier No. 4 by adding four feet on one side and five feet on the other; this has been found necessary by reason of cracks in it and the danger of its yielding to the pressure of the ice at the breaking up of the river in the spring, that such structure has cost nearly $500,000 and would be in danger unless said repairs and addition to the pier were made

Defendant admits that it has built a railroad to Iowa City as charged, that the eastern terminus of said railroad is the eastern boundary of the State of Iowa as prescribed in its articles of association.

Defendant denies the increased obstruction or hindrance or delay and damage from the enlargement and repairs; and avers that complainant has an adequate remedy at law.

As to the refusal of persons to ship freight on complainant's boats by reason of the danger of passing the bridge, defendant does not believe it.

A large body of conflicting testimony was taken to establish the respective allegations of the bill and answer. After several preliminary hearings, the cause was submitted upon the bill, answer and evidence. The Court rendered a decree in favor of the complainant, and ordered that so much of the bridge as was in Iowa should be abated. From this decree defendant appealed to the Supreme Court of the United States.

Mr. Cook, of Illinois, and *Mr. Reverdy Johnson*, of Maryland, for Appellants.

Mr. Lincoln, of Ohio, for Appellee.

Mr. Justice CATRON. James Ward charges the Mississippi and Missouri Railroad Company with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island, and prays that the nuisance may be abated.

The respondent resists the relief prayed, on the ground, among others, that the complainant does not stand in a position to maintain this suit.

Ward was part owner of three steamboats—and commander of one of them—navigating the river in successive trips between St. Louis and St. Paul; and which boats, the complainant alleges, were much injured and delayed by the bridge, which he avers is a great obstruction to navigation—amounting to a prominent nuisance. It is insisted that Ward cannot sue alone, and could only come before the Court jointly with the other part owners

of the vessels injured and delayed. He seeks no damages by his bill, but only an abatement of the nuisance, as a preventive remedy against future injury and delay.

A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in Chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are or may be injured; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit any other person, as complainant, who has sustained injury. Gibbons on Dilapidation, 402. The character of the nuisance and the sufficiency of the damage sustained is to be judged by the Courts. *Iverson* vs. *Moore*, (Ld. Ray, 486; 1 Salk., 15); Gibbons on Dilapidation, 403. But the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.

It is next objected that there are not proper defendants brought before the Court. The Chicago and Rock Island Railroad Company, who own the bridge on the Illinois side of the river, and the Bridge Company who built it, and also A. C. Flagg, who holds a mortgage on the bridge as trustee for others who advanced money to aid in its erection, are not made parties to the suit. The Chicago and Rock Island Railroad Company, and the Bridge Company, are incorporated, and located in the State of Illinois, and Flagg resides in the State of New York. The alleged nuisance is situate in Iowa, and being local, the suit could only be brought in that State; and, therefore, the Court had no power to bring these parties in interest before it.

If the Iowa corporation could have been individually indicted for creating the nuisance, no reason exists why it should not be

individually prosecuted in Chancery for its abatement. But the facts present a much more serious objection to the complainant's right to sue than either of those above stated. The Constitution of Illinois calls for the middle of the Mississippi river as the western boundary of that State, and as Iowa was admitted into the Union after Illinois, a line in the middle of the river is the dividing line between the States.

The complainant sued in the Federal Court because of his citizenship in a different State from the defendant; and the United States District Court holden in Iowa exercised the same jurisdiction that a State Court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa, and its piers, the Court below acted, and ordered that the structure should be removed.

In considering the merits and the other question as respects the complainant's right to sue, some additional facts need be stated.

This bridge is one thousand five hundred and seventy feet long, and the number of piers is six. Three of them are on the Iowa side of the river. The draw pier is the fourth; it is three hundred and eighty-six feet long at its bottom, and forty-five feet wide. The draw space on the Iowa side is one hundred and eleven feet, and on the Illinois side one hundred and sixteen feet wide in the clear. The distance from centre to centre of the small piers is two hundred and fifty-seven feet. The long pier stands at an angle with the thread of the current of about twenty-four degrees, and the small piers are nearly on a line with the thread of the current. The Illinois draw passage is directly over the deepest channel of the river, and directly over the usual track of steamboats before the bridge was built. The Mississippi is about one thousand four hundred and ten feet wide at the bridge, and the middle of the river is about eighty feet westwardly of the long pier.

The Illinois draw passage (one hundred and sixteen feet), the width of the long pier (forty-five feet), and the eighty feet between it and the eastern line of Iowa cover a space of two hundred and forty feet of water-way, and which embraces the main channel,

where steamboats have at all times navigated. It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he found his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance.

An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the Courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object.

The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the Court's jurisdiction and powers of inquiry, and outside of the case.

The District Court ordered three spans of the bridge and three of its piers to be removed, extending to middle of the river: And what would be the consequence if we were to affirm that decree? It would, as a consequence, render the bridge useless throughout, but it would not materially remedy the nuisance complained of. The navigation would certainly not be improved so far as the complainant is concerned by removing the Iowa end of the bridge. The cross currents alleged to exist would remain; the large eddy at the lower end of the long pier, and the obstruction to the Iowa draw-passage by the eddy, would still remain.

In the next place: Is the bridge *west* of the Illinois boundary an *unreasonable* obstruction, and therefore a nuisance, that a Court of Chancery can lawfully remove? In considering this question we must be governed by the same rule on which a Court of law could proceed in case of an indictment against the Bridge Company for committing the nuisance; and the rule is that if the abrigdment of the right of passage occasioned by the erection was for a public purpose and produced a public benefit,

and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable. *Rex* vs. *Russell*, (6 Barn. & Cresw., 566; 13 How., 623; 15 Wendell, 133.)

Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a Court of Chancery where the Court ascertains the fact of nuisance. 2 Story's Com. on Eq., 203, 204.

To say the least in this case, it is certainly very doubtful whether the bridge on the Iowa side is a serious obstruction, amounting to a nuisance.

The smaller piers on that side are parallel with the current passing through them, and do not occasion much impediment of navigation to boats without chimneys, nor to rafts.

The main channel *where steamboats* uniformly pass before the bridge was built, and must now pass, is eastwardly of the middle of the river, and on the Illinois side. On this state of the facts, it must be admitted that it is hardly possible to deal with the whole obstruction of any bridge across the Mississippi river, it being a boundary between States almost throughout its whole length. And it is difficult to decree in any case of material obstruction, unless the whole nuisance is in the power of the Court. The case before us presents the difficulty very prominently. The plaintiff's case mainly rests on the fact that the draw pier is at an angle to the current, and it is assumed that if this pier was re-constructed parallel with the current, and the draw on the Illinois side was widened the obstruction would be removed to a degree making it short of a nuisance. Now this is a question that we cannot examine, nor reach by a decree, as the relief suggested is clearly beyond our power in this suit Congress could extend the jurisdiction of the Federal Courts across the Mississippi river by enlarging the judicial districts on

either side; or it could confer concurrent jurisdiction on adjoining districts, extending to trespasses and torts committed within the shores of the river. But the Courts of justice cannot do it unless authorized by an Act of Congress.

It is also insisted with great earnestness that the public is entitled to the free navigation of the *whole* river from bank to bank, and as the western half of the river is undeniably within the jurisdiction of Iowa, it follows that the bridge is a clear nuisance within that district to the extent of half its length. According to this assumption no lawful bridge could be built across the Mississippi anywhere; nor could the great facilities to commerce, accomplished by the invention of railroads, be made available where great rivers had to be crossed.

It is ordered that the bill be dismissed and that the costs be divided—each party paying its own.

Mr. Justice NELSON, dissenting. I am unable to agree to the opinion of the majority of the Court in this case. The main issue presented on the pleadings and proofs involves the question, whether or not, the free navigation of the Mississippi river is obstructed by the erection of the bridge in question across its bed.

The bridge spans the entire stream. As I understood the opinion, it neither denies nor admits the obstruction, but places the decision upon the ground, that the jurisdiction of the Court is incompetent to reach or deal with the question.

The east line of the boundary of the State of Iowa and which constitutes the boundary of the District of the Federal Court, and of course of its jurisdiction, is the middle of the Mississippi river: and the same line constitutes the west boundary of the State of Illinois, and of course the limit of the jurisdiction of the Federal Court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this Court for the District of Iowa and the other moiety within the jurisdiction of the Court for the District of Illinois. Neither Court possess any local jurisdiction over the entire river, and hence the idea that neither Court is competent or equal to deal with the obstruction;

and especially that the Court in the Iowa District cannot deal with it on the Illinois side; and for the same reason the Court in the Illinois District could not, if the suit was in that Court, deal with it on the Iowa side.

Now one plain answer to this course of argument seems to me is, that the obstruction complained of is an obstruction of the moiety of the river on the Iowa side, and within the admitted jurisdiction of the Court. There can, therefore, be no want of power in the Court to deal with this part of the obstruction. Indeed, it is the only Federal Court that can deal with it.

I have not been able to discover any answer to this view, as it respects the jurisdiction of the Court, or its duty to exercise it. It is admitted, that this moiety of the river has been wholly obstructed so far as the free navigation of the same is concerned —a total obstruction by the erection of the bridge.

I am aware, it is said, or intimated, that the main navigable channel of the river is on the Illinois side; and hence the removal of the obstruction on the Iowa side, could not remedy the wrong complained of. But is this an answer? It may be admitted, that the channel on the Illinois side affords the best navigable channel at all seasons of the year, for the passage of boats. But the Iowa side or moiety is also navigable; and, perhaps, for two-thirds of the season quite equal to that on the other side, if not in a superior degree, for the navigation of many of the boats and water-craft employed on this river. Even in the season of low water the depth of the water on the Iowa side ranges from six to ten feet at or near the bridge, as shown by the surveys of the Government Engineers.

But I do not place my dissent to the opinion of the Court wholly, nor even mainly, on the ground above stated, but upon much higher and broader ground.

The right to a free and unobstructed navigation of this river on the part of the public, and especially of the citizens of the United States, depends upon the Constitution and the Laws of the United States—the public law of the country.

The local laws of the States have no control over it. I speak now of the free and unobstructed navigation of the river, and

according to this general or public law, the right of navigation exists over every part of it. No principle is better settled or more generally admitted. The reason given is well stated by Lord Denman, in *Williams* vs. *Wilcox*, (8 Ad. & Ell., 314), and perhaps no river or navigable stream affords a better illustration of the soundness of the principle, or of the reasons upon which it is founded, than the river in question. The reasons are, "that the nature of the highway which a navigable river affords,—liable to be affected by natural and uncontrollable causes, presenting inconveniences in different parts and in different sides, according to changes of wind or direction of the vessel, and attended by the important circumstance, that, upon no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel,—all these considerations," he observes, "make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks."

Now, this principle, if acknowledged and applied in this case, affords not only ground for the exercise of the jurisdiction of the Court, but makes it a duty to inquire into the question of obstruction, and deal with it according as the pleadings and proofs may require or justify.

I agree that this principle has been modified by the judgment of this Court in the case of the Wheeling Bridge, in its endeavor to harmonize this public right of navigation with the subordinate right of the States to erect bridges over these navigable waters.

The Court there determined that in the erection of a bridge under State authority, if there still existed a free and unobstructed navigation of the river, the bridge would not be considered a nuisance, but upheld as lawful.

The bridge in question is entitled to the benefit of this modification of the principle. And I agree that if there is a free and unobstructed navigation of this river on the Illinois side, it would afford an answer to the admitted obstruction on the side in Iowa. But this is the only answer that can be given, and it

is apparent that this answer raises the question whether or not such a channel was left open, a question which the Court must hear and determine, and without hearing and determining which in favor of the defendants, the decree must pass against them.

It seems to me, therefore, without pursuing the case further that the material question in the case before the Court below was, whether, notwithstanding the erection of the bridge, a free and unobstructed navigation for the passage of boats existed on the Illinois side of the river; and hence, necessarily, whether or not the bridge constituted an obstruction over that channel. If it did not, then the case fell within the qualification of the principle as applied in the Wheeling Bridge case. If it did, then clearly no defence was shewn to the admitted obstruction of that part of the river on the Iowa side.

I express no opinion upon the question of fact, the obstruction, as that question is not reached according to the decision of a majority of the Court.

I am requested to state that Mr. Justice Wayne and Clifford concur in this opinion.

NOONAN *vs.* LEE.

1. Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject.
2. Where a map or plat is referred to in a deed for the purpose of fixing a boundary, the effect is the same as if it were copied into the deed.
3. This is a familiar rule of construction in all those cases wherein no other description is given in the title-deeds, than the number of the lot on the Surveyor's plan of a township or other large tract of land.
4. Where a plat is referred to in a deed simply for the purpose of fixing boundary, the fact that such plat was illegally made does not in any wise effect the validity of the deed.
5. The Statute of Wisconsin of 1849 permits a grantor out of possession to make a valid conveyance of lands adversely held by another.

6. In all cases where there is adverse possession, by virtue of a paramount title, of lands thus conveyed, such possession is regarded as eviction, and involves a breach of the covenant of warranty.

7. Where the paramount title is in the warrantor and the adverse possession is tortious, it is no eviction either actual or constructive, and no action will lie upon the covenant.

8. A purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase-money on the mere ground of defect of title, there being no fraud or misrepresentation.

9. In such a case he must seek his remedy at law on the covenants in the deed.

10. If there is no fraud and no covenants to secure the title, he is without remedy, as the vendor selling in good faith is not responsible for the goodness of his title, beyond the extent of his covenants in the deed.

11. Relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.

12. Where a party designing to foreclose a mortgage, notified the morgagor before filing the bill, that he elected to consider the entire amount of the mortgage debt as due, he was entitled to a decree for the full amount although, according to the terms of the bond, one of the installments was not due when the bill was filed.

13. The equity jurisdiction of the Courts of the United States is derived from the Constitution and laws of the United States and their power and rules of decision are the same in all the States.

14. Rules of decision established by the Supreme Court for its own government and that of subordinate Courts are unaffected by State legislation.

15. Without the authority of a rule of the Supreme Court, a District Court of the United States has no authority to direct a mortgagor to pay the balance of debt, which may remain unsatisfied after the sale of the mortgaged premises

Appeal from the District Court of the United States for the District of Wisconsin.

Mr. Gillet, of District of Columbia, for Appellant.

Mr. Brown, of Wisconsin, for Respondent.

Mr. Justice SWAYNE. A careful examination of the facts disclosed in the record, is necessary to enable us to arrive at a proper solution of the questions presented for our determination.

Lee sold, on the 1st day of October, 1855, he and his wife, by deed duly executed, conveyed to Noonan certain real estate therein described, as follows:

"One equal undivided half part or share of that certain tract of land bounded and described as follows, viz.: Beginning in the centre of the Milwaukie river, on the centre of the road represented on the recorded plat of the village of Mechanicsville as running east and west between blocks five (5) and six (6) in said village of Mechanicsville; running thence easterly in the centre of said street to the centre of a street running north and south between blocks three (3) and (5) in Mechanicsville aforesaid; thence southerly in the centre of the last mentioned street to the centre of a street running east and west between blocks three (3) and four (4) in said village of Mechanicsville; thence easterly in the centre of said last mentioned street to a point that would be intersected by a north and south line through the middle of block three (3) in Mechanicsville aforesaid; thence southerly on the line bounding the west ends of lots one (1), two (2), three (3), and four (4) in block four (4) in Mechanicsville aforesaid, to south line of said lot four (4) in block four (4) aforesaid; thence easterly on the south line of lot four (4) in block four (4) to the west line of a lot of land containing about one-half ($\frac{1}{2}$) an acre, represented on said plat of Mechanicsville as being nearly in a square form in the southeast corner of the town plat of Mechanicsville aforesaid; thence southerly on the west line of said last-described tract of land to the south line of

the town plat of Mechanicsville; thence easterly on said last mentioned line to the east line of fractional lot two (2) in section four (4), in township seven (7), north of range twenty-two (22) east; thence south to the south line of said fractional lot two (2); thence westerly on the south line of said fractional lot two (2) to the centre of the Milwaukie river; thence northerly in the centre of the Milwaukie river as it winds and turns to the place of beginning. Also the privilege of damming and flowing the Milwaukie river on said fractional lot two (2), as high as said river would be raised by maintaining a dam at least nine feet high, where a certain dam was located across said river, near the south line of fractional lot two (2), in the year 1837, as described in deed from Daniel Bigelow and Amasa Bigelow to Herman V. Prentice, recorded in Volume 'C' of deeds, on page 329, as to flow-water."

The deed contains a covenant of general warranty.

Upon the same day Noonan executed to Lee a mortgage upon the same premises, conditioned to secure the payment of $4,000, in four equal annual instalments, with interest at the rate of 7 per cent. per annum, payable annually, according to the condition of a bond of the same date executed by Noonan to Lee; and also to secure the payment, by Noonan, of all taxes upon the mortgaged premises. It was further provided, that upon any default by Noonan in respect of the due payment of principal, interest, or taxes, the entire principal of the mortgage debt should, at the option of Lee, thereupon be deemed to have become due, and should, with the interest thereon, be collectable.

At the time of the execution of the bond, Lee made and signed the following endorsement upon it:

"I agree, if my title fails to the property, for the consideration of which this bond is given, except as against the United States, for the portion of the river beyond the meandered line, that I will not enforce this bond; and if any incumbrance shall be found, that the amount of the same shall be deducted from the moneys to fall due on this bond."

On the 4th of March, 1859, Lee filed his bill setting forth that Noonan had paid nothing either of principal or interest of the

mortgage debt; that he had notified Noonan that he claimed the entire debt to be due, and praying for a sale of the mortgaged premises, the payment of the mortgage debt, and for general relief.

The decree finds the amount due Lee to be $5,267.20; directs the sale of the mortgage premises, the payment of the mortgage debt, and the bringing of the surplus moneys, if there were any, into Court, and then provides that if the moneys arising from the sale were insufficient to pay the debt, interest and costs, that the Marshal in his report of the sale should specify the amount of the deficiency, that Noonan should pay it with interest, "*and that the complainant may have execution therefor.*"

From this decree Noonan appealed to this Court

Several objections are made here to the decree:

I. It is said the deed is void because it refers for a part of the boundaries to the recorded plat of the town of Mechanicsville.

The law of Wisconsin (revision of 1849) requires that a town plat shall give "the names, width, courses, boundary, and extent," of all streets and alleys; that it shall be certified by the surveyor, acknowledged before an officer authorized to take the acknowledgment of deeds, and that it shall then, with the certificate of acknowledgment, be recorded.

The 9th section of the Act provides that if any person "shall dispose of, offer for sale or lease" any lot or part of a lot before these requirements are complied with, he "shall forfeit and pay the sum of $25 for each and every lot or part of a lot sold or disposed of, leased or offered for sale."

This plat was acknowledged on the 15th of March, 1836, and recorded on the 15th of September, 1855. It does not give the names, courses, boundary or length of the streets, and it is not certified by the Surveyor. The certificate of acknowledgment represents the plat as laid out on the "south-east part of the S. E. quarter of section No. 4 in T. No. 7, in R. No. 22 E., on the east side of the Milwaukie river." It was in fact laid out on fractional lot 2, of the section named. The southeast quarter is upon the other side of the section and does not approach the river. Lot 2 bounds upon the river. A large lot delineated on

the plat bounding upon the river is marked "reserved for hydraulic purposes." An island opposite to it is laid down upon the plat. Fractional lot 2, which is twice referred to in the boundaries as given in the deed, bounds upon the river. Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject. The designation of the "southeast quarter" in the certificate of acknowledgment was a clerical mistake. The maxim "*falso demonstratio non nocet*" applies. The proof in the case shows clearly where the plat was in fact located. As regards the statute, the plat was fatally defective and afforded no warrant to the recording officer for putting it on record. Nevertheless, its being there was a fact, and whether there or elsewhere, the reference to it in a deed for the purpose of fixing a boundary, is sufficient. "That is certain which can be rendered certain." Where a map or plat is thus referred to, the effect is the same as if it were copied into the deed. "This is a familiar rule of construction, in all those cases wherein no other description is given in the title deeds, than the number of the lot on the Surveyor's plan of a township or other large tract of land." *Davis* vs. *Rainesford*, (17Mass., 211); *McIver's Lessee* vs. *Walker et al.*, (4 Wheat., 445).

II. It is claimed that the deed is void because it was executed to convey lots designated upon a town plat not made in conformity to law, and which it was therefore penal to sell.

No lots are mentioned. The plat is referred to only for the purpose of boundary. The land with the boundaries is conveyed without reference to any subdivision. The fact that it had been illegally laid out and platted into lots and streets does not in any wise affect the deed.

III. It is objected that the deed from Prentiss to Church and Clark of August 4, 1847, in Lee's chain of title, and the deed from Church and Clark to Lee of July 7, 1848, were void, because they were made by grantors out of possession, when the premises were held adversely by other parties, under deeds apparently valid.

At the dates of those deeds the Coltons were in possession under a deed of the 22d of June, 1847, from James H. Rogers.

The only part of the description in that deed referring to the premises in controversy is as follows:

"Twenty-two acres of land more or less undivided, in fractional lot number two of section four in township seven, range twenty-two, together with one-half of the water power belonging to said fractional lot two, and also all the right, title and interest of the said parties of the first part in and to said lot two."

A title to twenty-two acres undivided would have given the grantee no right to take exclusive possession of the mortgage premises. So far as the record discloses the facts, it appears that Rogers claimed entirely under sales for taxes. It will presently appear that they gave him no title, real or apparent which he could convey to another.

IV. The tax deeds.

It is not denied that at the time Lee conveyed to Noonan, his chain of title was perfect, unless it was broken by one or more of the facts claimed by Noonan to have produced that effect. In this connection the tax deeds found in the record are relied upon. They consist of Exhibits C, D, E, F, G, H, I, J, and the deed to Orton of the 25th of April, 1852.

(1). The deed last named does not appear to have been recorded. Possession under it can therefore have no effect upon the rights of Lee. The description in the deed does not cover the premises in controversy. That part of the description relied upon is in these words:

"Part of the S. E. quarter section fourth, T. 7, R. 22, bounded north by Demster, east by Jones and Bare, west by river, and south by Allerding, (nineten acres)."

The land in controversy is not in *the southeast quarter* of the section, and there is nothing in the case which shows what river is referred to, or where the lands of Demster and the other parties named are situated.

(2). Exhibit F, I, and J, are duplicates respectively of Exhibits H, C, and E, and may be laid out of view.

(3). Exhibits C, D, and G, embrace none of the land in controversy. This leaves only Exhibits E and H to be examined.

(4). Exhibit "E."

This is a deed to James H. Rogers. It bears date on the 17th of February, 1846. It recites a sale to Rogers on the 14th day of December, 1840, for the taxes of that year. The description embraces lots one and six in block five of the plat. This block is within the limits of the mortgaged premises. At the time of the sale, and for several years previous, Rogers had been in possession of the mortgaged premises under the deed of the 27th of July, 1837, from Prentiss, to whom he had given back a mortgage of the same date to secure the purchase-money. Prentiss had proceeded to foreclose the mortgage, and the premises were sold under a decree rendered on the 26th of June, 1840. Prentiss became the purchaser, and on the 5th of October, 1840, received the master's deed for the premises.

Rogers being in possession, the Statutes of Wisconsin required him to pay the taxes, and gave him an action to recover the money back, if he were entitled to it, from the party to whose benefit the payment enured. (Revised Statutes of 1839, sec. 14, p. 47.)

His relation to the property, and to his vendor and mortgagee also, rendered it his duty to make such payment. Neither he nor any one claiming under him can avail himself of a title thus acquired, as against Prentiss and those claiming under him. *Douglass* vs. *Dangerfield*, (10 O. Rep., 152); *Creps* vs. *Baird*, (8 O. S. R., 377).

(5). Exhibit "H."

This deed was also to James H. Rogers, and bears date on the 23d of December, 1845. It recites that the sale was made to Rogers on the 9th of December, 1839, for the taxes of that year.

It embraces lots 1, 2, 3, 4, 5, and 6, in block 5, as delineated on the plat. During all of the year 1839, Rogers was in possession as the vendee of Prentiss, and the same remarks apply as to Exhibit "E."

Underlying these deeds is another objection.

We have already referred to the non-conformity of the town plat to the requirements of the statute, and the fact that it was penal to sell or lease any lot, as such, which it represented All the witnesses, including Orton, who claimed to be in posses

sion of the whole of fractional lot 2, speak of it as a "pretended plat." Orton says:

"I do not know of such a village as Mechanicsville in fact, though I have heard of it. I do not know where the plat of Mechanicsville is located, though I know where they claim it is located. I know the land described in the mortgage in the bill of complaint from its boundaries."

It does not appear in the case that any street was ever improved, that any lot was ever enclosed, or that any house was ever built with reference to the boundaries of any street or lot. It comes out incidentally in the evidence touching possession, that there is but one house on the plat, and that it is in a ruinous condition and unoccupied. Nothing is proved *in pais*, recognizing the existence of the plat.

Under these circumstances it may well be doubted whether the sales of lots for taxes were not illegal and void. *Wheeler* vs. *Russell*, (17 Mass., 258); *Strong* vs. *Darling et al.*, (9 O. Rep. 201).

We have not found it necessary to decide that question, and we express no opinion upon the subject.

As the facts are disclosed in the record, we find no defect in the title of Lee. We find that Noonan's title has not "failed," and no encumbrance upon the property is shown. There has been, therefore, no breach of the agreement endorsed upon the bond; nor has there been any breach of the covenant of general warranty in Lee's deed to Noonan. The deed contains no other covenant. The Statute of Wisconsin of 1849 permits a grantor out of possession to make a valid conveyance of lands adversely held by another. In all cases where there is adverse possession, by virtue of a paramount title, of lands thus conveyed, such possession is regarded as eviction, and involves a breach of the covenant of warranty. Where, as in this case, the paramount title is in the warrantor and the adverse possession tortious, it is no eviction either actual or constructive, and no action will lie upon the covenant. *Randolph* vs. *Meek*, (1 Martin & Yerger, 58); *Moore* vs. *Vail*, (17 Ill., 185); Rawle on Covenants of Title, 224)

There is another view of this case which must not be passed over in silence.

It is not claimed by Noonan in his answer that there was any fraud or misrepresentation on the part of Lee, or that any fact exists in regard to the title which was unknown to him when he bought the property. It appears by the testimony of Orton. that there was a controversy between him and Noonan about water power, and that it has been adjusted. Orton says: "He" (Noonan) "has no interest with me in this land *of record.* I don't *know* that he has any." "I *don't know* that I have any interest in the result of this suit. I *dont know* that I will be benefitted in any way by Noonan's success in this suit." This is guarded and peculiar language. It is impossible to read the testimony of Orton and resist the conclusion that Noonan bought the property for a purpose, and that having held the title for several years without paying anything, and accomplished that purpose, he is now seeking, upon the pretence of defects of title, finally to avoid the payment of the purchase money, and throw back the property upon the hands of his vendor. This ungracious work a Court of Equity will not permit him to do.

If Noonan had gone into possession, and continued in possession under his deed from Lee, this elaborate examination of the state of the title would not have been necessary. With reference to that class of cases, this Court, in *Patton* vs. *Taylor,* (7 How., 159), after referring to numerous authorities, thus laid down the law:

"These cases will show that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money, on the mere ground of defect of title there being no fraud or misrepresentation, and that in such a case he must seek his remedy at law on the covenants in his deed. That if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed. And that further relief will not be afforded upon the ground of fraud, unless it be made a dis

tinct allegation in the bill, so that it may be put in issue by the pleadings."

This doctrine is fully sustained by the best considered authorities. *Corning* vs. *Smith*, (2 Seld., 84); *Plat* vs. *Gilchrist*, (3 Sandf. S. C. Rep., 118); *Butler* vs. *Hill*, (6 Ohio S. R., 217); *Beebe* vs *Swartout*, (3 Gilman, 162).

The proofs in this case show, that before filing his bill, Lee notified Noonan, that he elected to consider the entire amount of the mortgage debt as due. This entitled him to a decree for the full amount, although according to the terms of the bond, one of the instalments was not due when the bill was filed. *Noyes* vs. *Clark*, (7 Paige, 180).

It remains to consider that part of the decree which directs Noonan to pay the balance which may remain unsatisfied after exhausting the proceeds of the mortgaged premises.

The equity jurisdiction of the Courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This Court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation. *Neves* vs. *Scott*, (13 How., 270); *Boyle* vs. *Zachary Turner*, (6 Pet., 658); *Robinson* vs. *Campbell*, (3 Wheat., 323).

A majority of my brethren are of the opinion, and I am directed by them so to announce, that in the absence of a rule of this Court authorizing it to be done, it was not competent for the Court below to make such an order.

That part of the decree is reversed. The residue is affirmed. The cause will be remanded to the Court below with instructions to proceed accordingly.

GILMAN *vs.* THE CITY OF SHEBOYGAN.

1. Where a State Legislature authorizes a City to borrow money, issue bonds and tax all the property in the city to pay it, this is not a contract with the bondholders, that the State shall not afterwards exercise her power to modify the taxation, or exempt portions of the property from taxation.
2. The fact that a State by an Act of her Legislature, has stripped herself of any portion of her sovereignty, is not to be assumed unless the language used is too clear to admit of doubt.
3. If such a contract existed and if a subsequent law exempted some portion of the property, it does not lie in the mouth of a property-holder in the City to complain of it on the score of bad faith to the bondholders, if the bondholders themselves are silent.
4. A law authorizing a public corporation to contract a debt, and pay it by means of a tax, is not liable to the objection, that it takes private property for public purposes without compensation; for that clause of the Constitution is a limitation, not on the taxing power, but on the right of eminent domain.
5. The levying of taxes by a public corporation under the authority of State law, is the exercise of the taxing power, as much as the taxation of the citizens directly, for the support of the State Government.
6. The Constitution of Wisconsin, requires the rule of taxation to be uniform; and this means, that all kinds of property not absolutely exempt, must be taxed alike, by the same standard of valuation, equally with other taxable property, and co-extensively with the Territory to which it applies
7. A tax for a special purpose upon the City of Sheboygan and levied exclusively upon real property, was a discrimination in favor personal property, in conflict with the Constitution of the State, and therefore void.

Appeal from the District Court of the United States for the District of Wisconsin.

Mr. Doolittle, of Wisconsin, for Appellant.

Mr. Howe, of Wisconsin, for Appellee.

Mr. Justice SWAYNE. This is a suit in equity brought here by appeal from the District Court of the United States for the District of Wisconsin. The bill states as follows:

The complainant is the owner of a large amount of real estate in the City of Sheboygan, which is described in the bill.

On the 17th of January, 1854, the Legislature passed an act entitled "an Act to authorize the City of Sheboygan to aid in the construction of a railroad." This Act authorized the Commissioners named in it to borrow $100,000 upon the credit of the City to be invested in the capital stock of a Railroad Company, authorized to construct a railroad from the City of Sheboygan westwardly by way of Fon-du-lac to the Mississippi River, and to issue therefor the bonds of the City according to the provisions of the act.

The act further provided that the City should annually levy a tax upon all the taxable property of the City sufficient, in addition to the dividends upon the shares of its stock in the Company, to pay the interest upon the bonds.

The act also authorized the City Council to submit to the qualified voters of the City the question whether the further sum of $100,000 should be raised and invested in the same manner as the first $100,000.

By an act of the Legislature of the 28th of March, 1856, entitled, "An Act to authorize the City of Sheboygan to aid in the construction of the Sheboygan and Mississippi Railroad," the City Council was authorized to subscribe $50,000 to the capital stock of the Company, and to increase the amount of subscription from time to time until the aggregate should reach the sum of $100,000. The instalments upon the stock subscribed were to be paid by the levy of an annual tax upon all the real estate in the City—not exceeding $25,000 in any one year—until the whole amount of the subscriptions should be paid.

Under these Acts the City has made loans and issued its bonds therefor to the amount of $200,000.

The Legislature passed a subsequent Act, which is as follows:

"Section 1. All taxes hereafter levied by the Common Council of the City of Sheboygan for the (payment) of principal or

interest of any bonds issued or to be issued by said City to aid in the construction of any railroad, plank road, or for any improvement of the harbor at the mouth of the Sheboygan River, shall be levied by said Council on the real estate of said City exclusively.

"Sec. 2. All acts or parts of acts that conflict with the provisions of this act are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its passage.

"Approved March 7, 1857."

In the year 1857, the City Council under the last named act, levied a tax upon all the real estate within the limits of the City of six cents upon each dollar of the valuation thereof "for its harbor loans, railroad and plank road bonds," "and did not levy said sum or any part thereof upon any other kind of property within said City of Sheboygan for the said harbor loans, railroad and plank road bonds, but levied the tax for the payment of the interest upon those specific objects entirely and solely out of the real estate within said City limits; and that the real estate above stated and set forth in this complaint was included in and was taxed at the rate aforesaid, and for the purpose aforesaid."

At the time this tax was levied, there was personal property in the city of Sheboygan to the amount of three or four hundred thousand dollars, liable to taxation, and upon which no tax was levied for either of said purposes for the year 1857. The Act of March 7th, 1857, and the tax levied under it, are alleged to be void. Defendant, Geele, is the Treasurer of said City, and as such authorized to execute deeds for land sold for taxes when the time for redemption expires. The defendants' property in the City has been sold for said tax and bought in by the City. Geele threatens to execute deeds to the City for the same. The time for redemption is about to expire.

The deeds, it is alleged, will cast a cloud upon complainant's title, embarrass him in disposing of the property, and render it less valuable to him. The prayer of the bill is, that the Treasurer be perpetually enjoined from executing, and the City from receiving, such deeds, and for general relief. The complainant

subsequently filed an amended bill, in which it was claimed that the Act of 1857, and the tax levied under it, were void, because the Act of 1854 provided that a tax should be levied upon *all* the taxable property of the City for the payment of said bonds, that the bonds were issued and taken upon the faith of that act and that its provisions constitute a contract with the bond holders, which the Act of 1857 seeks to violate.

The defendants demurred, and the Court sustained the de murrer.

Was there such a contract as is averred in the amended bill?

The Act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the City, for the purposes specified. The imposition, modifi cation, and removal of taxes, and the exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised.

Admitting that the State *could* enter into such an engagement, there is no evidence that it *did.* This fact should never be assumed unless the language used be too clear to admit of doubt. If the agreement existed, the complainant is not in a position to make the question. There is no allegation that the tax levied is insufficient. We hear of no complaint from the bondholders. They are not before us. It does not belong to the complainant, vicariously, to enforce their contract and protect their rights.

The objection, that these acts take private property for public purposes without compensation, and hence are within the prohibition of the State constitution upon that subject, is also without foundation. That clause of the Constitution refers solely to the exercise, by the State, of the right of eminent domain. *The People* vs. *The Mayor of Brooklyn,* (4 Coms., 419).

Is the Act of 1857 invalid, because it requires the tax in question to be levied exclusively upon the real estate of the city?

The provisions of the State Constitution, to which our attention has been called, as bearing upon the subject, are the following:

Art. VIII. "Sec. 1.—The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe."

Art. XI. "Sec. 3.—It shall be the duty of the Legislature, and they are hereby required, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts, by such municipal corporations."

The Revised Statutes of Wisconsin, title 5, chap. 18, page 200, provide as follows:

"Sec. 1. All property, real and personal, within this State, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law."

"Sec. 4. The following property shall be exempt from taxation:

"All property, real and personal, of the United States and of this State. All public or corporate property of the several counties, cities, villages, towns and school districts in this State." * * *

"All property exempt by law from execution, not exceeding in value $200.

"The personal property of all literary, benevolent, charitable and scientific institutions within this State, and such real estate as shall be actually occupied by them for the purposes for which they have been or shall be organized."

"All houses of public worship, and the lots on which they are situate," &c.

"All public libraries, and the real and personal property belonging to or connected with the same.

"The property of all Indians, who are not citizens, except the lands held by them by purchase.

"The personal property of persons, who, by reason of infirmity, age and poverty, may, in the opinion of the assessors, be unable to contribute towards the public charges.

"All property, real and personal, belonging to any agricultural society in this State." * * *

No other property is exempted.

In *Weeks* vs. *The City of Milwaukie, et al.*, (10 Wis. Rep., 242, Mr. Justice Payne, referring to "the provision of Article II., Sec. 3, requiring the Legislature, in establishing municipal corporations, 'to restrict their powers of taxation so as to prevent abuses, &c.," says, "Restrictions may be and undoubtedly are necessary to prevent abuses which may not amount to a violation of the rule of uniformity. There may be *uniform abuse* of the taxing power by reckless and improvident management on the part of these local authorities, and I think the provision last mentioned was designed to give further protection—in addition to that furnished by the rule of uniformity."

Such was the unanimous judgment of the Court. Concurring in that opinion, we lay this section of the Constitution out of view.

In *Knowlton* vs. *The Supervisors of Rock County*, (9 Wis. Rep., 410,) the section requiring uniformity of taxation underwent an able and exhaustive examination. The Court affirmed the following propositions:

"The levying of taxes by the authorities of a county, city, or town, for their support is as much an exercise of the taxing power as when levied directly by the State for its support. The State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers.

"The Constitution of the State requires, as a rule in levying taxes, that the valuation must be uniform and in all cases alike or equal, operating alike upon all the taxable property throughout the territorial limits of the State or municipality within which the tax is to be raised. And where the Legislature prescribed a different rule, the act is a departure from the constitution and therefore void.

"The Constitution has fixed one unbending uniform rule of taxation for the State, and property cannot be classified and taxed as classed by different rules.

"The provision of the Constitution, that taxes shall be levied upon such property as the Legislature shall prescribe, does not sanction 'a discrimination which provides for taxing a particular kind of property for the support of Government by a different rule from that by which other property is taxed; for when the kind of property is prescribed the rule of taxation must be uniform. All kinds of property must be taxed uniformly, or be absolutely exempt."

In this case, under the provisions of the charter of the City of Janesville, lands within the City limits laid out into City lots, and other lands not so laid out, had been taxed at different rates, and the property of the plaintiff had been sold for the non-payment of the taxes. The Court held the tax void, and enjoined the treasurer from executing deeds to the tax purchasers.

In the case of *Weeks* vs. *The City of Milwaukie et al.*, (10 Wis. Rep., 242,) the preceding case was considered and approved by the Court. The proposition that the constitutional provision requiring the "rule of taxation to be uniform" extends to municipal corporations, and that the constitutional provision requiring the Legislature to restrict their powers of taxation was only intended to furnish a further protection, were expressly and unanimously re-affirmed. They held further, that where the assessors of the City of Milwaukie, in obedience to an ordinance of that City, omitted to assess property to the value of $150,000, which ought to have been assessed, and that property was thereby exempted from taxation, the omission was fatal to the entire tax, and that the complainant's taxes being increased by the omission he was entitled to an injunction to restrain the sale of his lands for such illegal taxes.

In *Sanderson* vs. *Cross*, (10 Wis. Rep., 282), the doctines of *Knowlton* vs. *The Supervisors of Rock County*, were again unanimously approved.

In their opinion the Court adopt the following language, from the *City of Zanesville* vs. *Richards*, (5 Ohio State Rep., 589) "The General Assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate

per cent. must be levied upon all property subject to taxation according to its true valuation money, so that all may bear an equal burden."

The Ohio case was decided under provisions in the Constitution of that State similar to those in the Constitution of Wisconsin, to which we have referred.

In the *Attorney-General* vs. *The Winnebago Lake and Fox River Plank Road Company*, (11 Wis. Rep. 42), the Court say: "It cannot be denied that under the power of exemption unjust enactments in respect of the power of taxation might be made. But those who framed the Constitution did not see fit to prevent such evils by depriving the Legislature of the power. But they did provide that whatever property was made taxable *at all* should be taxed by a uniform rule, which was designed to secure equality in the burdens as between the different kinds of taxable property, but of course not as between property taxable and that not taxable."

The Court refer with approbation to the *Exchange Bank of Columbus* vs. *Hines*, (3 O. S. Rep., 1.) In that case the Supreme Court of Ohio, say: "Taxing is required to be by a '*uniform rule*'—that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike—equally—which *is* taxing by a uniform rule."

We forbear to examine the soundness of the conclusions of the Supreme Court of Wisconsin. They need no support at our hands. We could add nothing to what they have so well and

ably said in vindication of their own views. Such a discussion would encumber this opinion without throwing any new light upon the subject.

Acting upon a principle, recognized in its administration from the earliest period of its history, this Court considers itself bound in cases like this, to follow the settled adjudications of the highest State Court, giving constructions to the Constitution and laws of the State. (*Leffingwell* vs. *Warren*, decided at this term.)

The bill avers that at the time the tax complained of was levied, there was personal property in the city, of the value of from $300,000 to $400,000, liable to taxation. The demurrer admits this fact. The statute prescribing the property to be taxed, and that to be wholly exempted from taxation, shows that this personal property must have been taxed for other purposes. This tax was levied exclusively upon the real estate of the City. That was a discrimination in favor of the personal property. It was beyond the constitutional power of the Legislature to make any discrimination. Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property.

The latter was attempted to be done, as has been shown, in the City of Janesville. The tax was adjudged to be utterly void.

The same result must follow here.

A case illustrating more strongly than the case before us, the the wisdom of the rule of the Constitution, as thus interpreted, and the injustice which may be done in departing from it, can hardly be imagined.

The Court below erred in sustaining the demurrer and dismissing the bill.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

GRIFFING *vs.* GIBB.

1 If a bill in equity, brought by the proprietor of a City lot, avers that the rights of the plaintiff are illegally, wrongfully and injuriously affected by the acts of the defendants, the bill on its face entitles the plaintiff to relief.

2 The defendant cannot sustain a demurrer to such a bill on the ground that he was justified by an act of State Legislature.

3. The Court is bound to notice judicially the laws of the State defining the limits of a City, in cases where the pleadings make it proper to do so; but not on a demurrer, where the facts, as stated in the bill, make it the duty of the Court to rule in favor of the plaintiff.

4. A demurrer is a denial in form and substance of the plaintiff's right to have his case considered in a Court of equity, and an admission of all its allegations that are properly pleaded.

Appeal from the decree of the District Court of the United States for the Northern District of California.

Frederick Griffing filed his bill in the District Court against Daniel Gibb and Donald Fraser, averring that he was the owner of two lots in San Francisco which originally fronted on the natural shore of the bay with bold deep water in front; that he bought this property with a view to its water front; that he built ware houses and a wharf on it to which ships of the largest size could come; that when he commenced his improvements there was no sign of any streets near him which interfered with his access to the water, the lines of Filbert and Battery streets being defined only on the City maps; that the defendants are engaged in filling up a certain part of the bay in a way which will prevent ships from coming to his ware-house—the part to be thus filled up being a lot of one hundred varas square, covered by navigable tide-water, and situate between, and forming, the northeast corner of Filbert and Battery streets as defined on the City map. The plaintiff asserts that these acts of the defendants are in violation of his rights, injurious to the public, and contrary to the Constitution and Laws of the United States

and of the State of California, and therefore prays for a perpetual injunction.

To this bill the defendants demur; the Court sustained the demurrer, and the plaintiff having failed to amend the bill within the time limited by the rule of Court, a final decree was passed, dismissing the bill. Thereupon the plaintiff took an appeal to this Court.

Mr. Hepburn and *Mr. Wilkins*, of California, for the appellant, insisted that the bill was erroneously dismissed. The plaintiff, on the facts averred in the bill and admitted in the demurrer, was entitled to relief. He could only be defeated by proof, that Battery and Filbert streets were legally extended by the proper authorities. The bill avers that they were *not* legally or officially laid out. The right of the defendants to do the thing complained of, so far from being admitted in the bill, is expressly averred to be wrongful.

Mr. Latham, of California, and *Mr. Black*, of Pennsylvania, for the appellee, maintained the correctness of the decree on the grounds: that,

1. The bill indicates distinctly the *locus in quo* of the acts complained of as being on a lot between certain streets defined on the City map.

2. This Court, as well as the District Court, is bound to notice, judicially, the public laws of a State and the acts of public corporations done in pursuance of them.

3. The laws of California and the acts of the City Government are here produced, and show that the place, which the defendants are filling up, is a part of the City covered by lots and streets, and not public waters of the bay.

4. The laws of California which relate to this subject are not unconstitutional.

5. The averment that the act of the defendants was wrongful is not to be taken as admitted by the demurrer. The demurrer admits the facts set forth in the bill, but not the legal conclusions

Mr. Justice WAYNE. This is an appeal from a decree of the Circuit Court of the United States for the Northern District of California.

The complainant seeks to obtain a perpetual injunction to restrain the defendants from piling and improving a lot of land claimed by them, which is said in the bill to be within the inside of the water front line of the city of San Francisco, and always covered by the tidewaters of the bay. He states that he is the owner in fee simple, and is in possession of two parcels of land; the first beginning at a point where the east line of Sanson street intersects the south line of Filbert street, running thence southwardly along the east line of Sanson street 137 feet; thence east, at right angles to Sanson street, 275 feet; thence north, parallel with Sanson street, 137½ feet, to a point in range with the south line of Filbert street; thence west 275 feet to the point of beginning. The second, "A lot beginning at a point where the east line of Sanson street intersects the northern line of Filbert street; thence north along the east line of Sanson street 137½ feet; thence at right angles to Sanson street 275 feet; thence south, parallel with Sanson street, 137½ feet, to a point in range with the north line of Filbert street; thence 275 feet to the place of beginning."

The complainant asserts that he is in the exclusive occupation and possession of both lots of land under a title in fee; that he has buildings and improvements upon them of the value of $200,000. He further avers that his lots originally fronted on and were a part of the natural shore of the bay of San Francisco; that they had a deep and high bank in the rear, with a bold and deep water in front, where the tide ebbed and flowed, where ships of the largest class navigated in safety to receive and discharge cargo. Passing over other allegations in the bill not necessary to be mentioned in this connection, the complainant asserts that he commenced to make his improvements in the year 1851, and that he had used and enjoyed them for the purposes for which they had been constructed, until interfered with by the defendants, having piles driven in front of his premises, under the navigable waters of the bay, extending over

a space of 275 feet square. That the defendants assert, notwithstanding his remonstrances against such piling, that they have a right to drive them, and declare it to be their intention to build a wharf upon a lot which they claim, situate as follows: Beginning at the northeast corner formed by the extended lines of Filbert and Battery streets, being a lot of land covered by the navigable tide of the bay of San Francisco, &c., &c., where ships of the largest class habitually pass and repass in their approaches to the complainant's warehouses. It is then averred that if the piling shall be done at that point that it will interfere with the public use of the harbor and the bay, obstruct the navigation, divert the tide from its usual flow and ebb, change its current, and shallow the water by deposits of sediment, as it has already done, there being shallower water at the point designated than there had been before the defendants wrongfully began to pile there, and particularly so in front of the complainant's premises, than there had been when he began to improve his premises in the year 1851; that the depth of the water there is being constantly lessened by said piling, greatly to the complainant's pecuniary loss, and will be to his irreparable injury unless the defendants shall be restrained from continuing their unlawful acts by an injunction, and by a decree of the Court for the abatement of the defendants' piling as a nuisance. That the piling which has been done by the defendants is contiguous to his premises; that it is on a lot covered by the ebb and flow of the tide of the bay of San Francisco, and that the defendants claim the lot to be within the City of San Francisco.

The defendants filed a general demurrer to the bill. We think that the Court erred in sustaining it, and in dismissing the bill of the complainant for want of an amendment, which the Court directed to be made by the next rule day. On the demurrer the ruling of the Court should have been for the complainant, instead of which the Court dismissed his bill. The only point, in our view of the case, when it was on its hearing in the Court below, was, whether the complainant had not shown, by the facts stated on the face of his bill, artificial as it may be in point of form, a case for relief within the jurisdiction

of a Court of Equity. We think it to be so, and shall remand it to the Court below for amendment and further procedure, as in the judgment of that Court, the case may require.

We further observe that the filing of a general demurrer was not in the pleadings, and facts of the case a proper defence. The defendants might have resorted to a plea alleging matter, which, if appearing on the face of the bill, would have been a good cause of demurrer, or the bill should have been answered. The demurrer filed was a denial in form and substance of the right of complainant to have his case considered in a Court of Equity, but an admission that all the allegations of it which were properly pleaded were true. In respect to what was said in the argument that this Court would, on the general demurrer of the defendants, judicially notice the Acts of California relating to the harbor of San Francisco, and particularly of the Water Lot Act of the 26th March, 1851, we will only remark that we should do so if the pleading in the case was such as permitted it to be done, and if we did not think, as we have already said, that upon that plea that the cause should not have been dismissed, and that the Courts should have ruled in favor of the complainant; and it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, each party paying his own costs on this appeal in this Court, and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, in conformity to the opinion of this Court.

BRONSON *vs.* RAILROAD COMPANY.

1. Where a Railroad Company, at different times, executed two mortgages on distinct portions of its road, to secure the debts of separate creditors, one mortgagee is not necessarily a party to a suit which the other may bring against the Company to foreclose his mortgage.
2. A purchaser of part of the road, including stock, machinery, franchises, &c., of the entire road, under the elder mortgage, cannot intervene, in a suit brought against the Company, by a junior mortgagee, for the purpose of keeping down the amount of the decree.
3. Such purchaser will not be permitted to intervene, and move the dismissal of an appeal taken by the junior mortgagee, though he show an agreement between the appellant and the appellee to increase the amount of the decree one hundred *per cent.* above what was found to be due in the Court below.
4. If the sale under the first mortgage was regular, and the property sold was covered by the mortgage, the purchaser has a good title, and it can make no difference to him whether the junior mortgagee gets a decree for little or much—his right is not dependent on the decree.
5. If any portion of the Company's property is claimed to be covered by both mortgages, that raises a question which cannot be determined in a suit for foreclosure brought by one of them.
6. General creditors, having no specific lien, have not a right to interfere in the contest between the debtor and third parties.
7. A decree for the sale of mortgaged premises is a final decree from which an appeal lies.
8. The right of a morgagee to appeal from a decree, with which he is dissatisfied, cannot be suspended by cross bills between other parties contesting matters with which the mortgagee has no concern.

This case was brought here by appeal from the Circuit Court of the United States for the District of Wisconsin. It was a bill in equity brought by Greene C. Bronson and James A. Soutter

trustee, &c., against the La Crosse and Milwaukie Railroad Company, and divers other defendants, creditors of that corporation. The Circuit Court made a decree in favor of the plaintiffs for one-half the amount of their claim, $565,260.05. From this decree the plaintiffs appealed. After the case came here on appeal, the parties made an agreement that the decree of the Court below should be reversed and a decree entered for the whole amount of the claim, that is to say, for a sum twice as large as that found to be due by the Circuit Court. F. P. James, Isaac Seymour, and N. A. Cowdrey moved for leave to intervene in the cause so as to protect their interests. They were creditors of the Railroad Company and purchasers of part of the road, stock and franchises, and alleged that the agreement to increase the amount of the decree was made with the fraudulent intent to injure them. The motions for leave to intervene and to dismiss the appeal, were made at the same time, were founded upon the affidavits of which the substance is given by Mr. Justice Davis and were argued together.

Mr. Black, of Pennsylvania, in support of the motion.

Mr. Ewing, of Ohio, and *Mr. Carlisle*, of Washington City, for the Appellants.

Mr. Justice DAVIS. F. P. James, Isaac Seymour, and N. A. Cowdrey ask leave to intervene in this cause, and to dismiss the appeal, and predicate their motion on two affidavits of F. P. James.

The first affidavit states substantially that on the 31st of December, 1856, the La Crosse and Milwaukie Railroad Company executed a mortgage on the western division of their road, lying between Portage and La Crosse, to Greene C. Bronson, James A. Soutter, and Shepard Knapp, as trustees, to secure certain bonds, which mortgage was afterwards foreclosed in the District Court of Wisconsin, and the mortgaged property sold, and purchased by the parties asking to intervene; that the same Railroad Company, on the 17th day of August, 1857, executed another

mortgage to these complainants, Bronson and Soutter, on the eastern division of their road, lying between Portage and Milwaukee, to secure certain other bonds; that suit was also brought on said mortage in the District Court of Wisconsin, where a decree was passed on the 13th day of January, 1862, for one-half of the face of the bonds, from which decree an appeal was taken by Bronson and Soutter to this Court; and that the parties to the suit have entered into fraudulent stipulations to reform the decree rendered below, so that the bonds will be paid in full, and that James Cowdrey and Seymour, as purchasers under the first mortgage, will be injured if the decree is thus reformed.

The second affidavit states that Nathaniel S. Bouton, on the 5th day of April, 1859, recovered a judgment in the same District Court for upwards of $7,000 against the La Crosse and Milwaukie Railroad Company, which judgment was assigned to F. P James & Co., and was a lien when this suit was instituted, and that neither Bouton nor his assignees were notified of the pendency of these proceedings; that there were issued under the mortgage of December 31st, 1856, bonds to the nominal or par value of $4,000,000, the greater portion of which are held by James and his associates in their own right or in trust for others, and that they have by the advice of counsel determined to abandon their purchase and ask for a re-sale of the whole property mortgaged by the deed of December 31st, 1856.

Have James, Seymour, and Cowdrey, a right to intervene in this cause, to make a motion to dismiss this appeal, or for any other purpose? The La Crosse and Milwaukee Railroad is a corporation created by the laws of Wisconsin to build a continuous line of railroad from the City of Milwaukie, on Lake Michigan, to La Crosse on the Mississippi River. Power was given to the Company to mortgage separate portions of their road, and in execution of that power the mortgage of December 31st, 1856, on the western division, and the mortgage of August 17th, 1857, on the eastern division were given. These mortgages were executed to secure specific liens on different parts of the road, and the bondholders evidently relied on these liens alone

for their security. Separate suits were brought at different times to foreclose these mortgages, and the parties in one suit were not necessarily parties in the other. The right to intervene as made by the first affidavit rests solely on the ground that James and his associates were purchasers of the western division of the road, which, as they insist, included "the personal property, machinery, rolling stock, franchises, rights, and privileges of the entire road."

This Court cannot in this suit decide whether the construction contended for by these parties as to the extent of their purchase is correct or not. Under the pleadings, no question is or could have been raised as to what property is covered by the mortgage deed. The controversy in the Court below was whether there should be a decree *nisi* for any amount, and if so how much. The Court in fixing the amount due on the mortgage, estimated the bonds not at par, but at the rate of fifty cents on the dollar, and decreed accordingly, and the complainants below appealed. It is not perceived *how* the stipulation to reform the decree can affect the *right* of James & Co., to the claim which they advance. If under their purchase they take the rolling stock and franchises of the whole road, what concern is it to them whether the decree is for $500,000, or $1,000,000 ?

Such a *right* is surely not dependent on the amount of the decree. But it is claimed, in the second affidavit, that Bouton, a judgment creditor, having lien, and necessarilly a party, had no notice of the pendency of this suit. The answer to this statement is, that the record informs us (p. 297) that Bouton did appear by attorney, and consented that a decree might be rendered pursuant to the prayer in the bill.

One other ground remains on which the right to intervene is placed—that of general creditors. James and his associates, owning a large portion of the bonds secured by the lien of the first mortgage, insist that the mortgage is an insufficient security. and that they are, therefore, interested in lessening the amount of the decree to be rendered in this cause. Every creditor is, of course, concerned that his debtor should reduce his obligations. The less the debtor owes the greater his ability to pay.

But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties? If the general creditors of a mortgagor are suffered to intervene in an appellate tribunal, this Court would become the triers of questions of fact outside of the record, and that too on *ex parte* affidavits—by no means the best mode of ascertaining truth.

If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment.

If, as is charged, the parties to this suit have made agreements in fraud of the law, or rights of third persons, the Circuit Court of Wisconsin can give relief in a suit instituted there for that purpose, where testimony can be taken, and the valuable right of cross-examination at the same time preserved. In any case—where it is apprehended that the parties to the record seek to dispose of it by stipulations fraudulently made, and which will affect injuriously the rights of others—the Court will respectfully hear and consider *suggestions*, and will endeavor to protect itself from imposition, and prevent the wrong that is contemplated.

But the Court cannot lay down any general rule of practice by which it will be governed, for each case must depend on its own circumstances.

The motion is overruled.

At a subsequent day of the term a motion was made by one of the persons who was a joint defendant with the La Crosse and Milwaukie Railroad Company, to dismiss the appeal on the ground that the decree of the Court below was not final.

Mr. Carpenter, of Wisconsin, in support of the motion.

Mr. Ewing and *Mr. Carlisle*, contra.

Mr. Justice DAVIS. This case is again before us. A motion

is now made by one of the defendants to dismiss the appeal, because there was no final decree in the meaning of the Act of Congress which authorizes this Court to exercise appellate jurisdiction only by appeal, or writ of error from a *final* judgment or decree.

This is a suit in equity brought by Bronson & Soutter in the District Court of Wisconsin to foreclose a second mortgage, given by the La Crosse and Milwaukie Railroad Company, to secure a large issue of bonds. The company being in arrears for interest, Bronson & Soutter sought the aid of a Court of Equity to enforce their trust. Numerous persons were made defendants, who had, or were supposed to have liens, and the record, which has swelled to a printed volume of six hundred pages, shows the litigation to have been protracted and bitter. The bill was filed on the 9th day of December, 1859. A part of the defendants answered, which answers were replied to, and a *pro confesso* decree was taken as to those who did not answer, and the cause came on for final hearing on the 13th day of January, 1862. The Court judicially ascertained that there was owing to the complainants, on the security of their mortgage, the sum of $500,000 for principal, and $65,260.05 for interest, and *decreed* that the mortgaged premises should be sold at public auction by the marshal, unless the amount found due for arrears of interest, with taxed costs, should be paid before the day of sale. The equity of redemption was foreclosed, and it was ordered, if a sale should be made, that the purchaser should have possession, and that those who had control of the road should surrender the possession on production of the deed from the marshal with a certified copy of the order confirming the sale. It was also decreed, if the interest and costs were paid, that further proceedings should be staid until some future default should be made in the payment of interest, when, on petition, the Court would found another order for a sale.

The litigation between Bronson & Soutter and the defendants, on any matter in which there was a joint interest, is closed by this decree. The object of the suit was to ascertain how much money was due on the security of the mortgage and to sell the

property unless the amount was paid. The Court did find what was due, and ordered a sale. The very purpose of the litigation, which was initiated by Bronson & Soutter, was accomplished and nothing remained for them to do, if they felt aggrieved by the finding of the Court, but to appeal. Their right of appeal attached on the rendition of the decree, and the time limited in which an appeal could be taken began to run from the date of the decree. It is said that some exceptions to the report of the master were pending and undetermined when this decree was made; but those exceptions did not relate to any claim of Bronson & Soutter; they were collateral to the main purpose of the suit, and concerned the defendants alone.

If Bronson & Soutter should have to sit quietly by until the equities of the different lien creditors of the La Crosse & Milwaukie Railroad Company—with which they have no concern—are determined, they might be ruined before they could avail themselves of their right of appeal. Bronson & Soutter insist that there is due them, as trustees, on this mortgage, $1,000,000. with large arrears of interest, which claim was reduced one-half by the Court below.

The La Crosse & Milwaukie Railroad Company is evidently greatly embarrassed, and the property mortgaged is doubtless the only security relied on by the trustees for payment.

Now, if the Court had the right to make the decree and order the sale—of which there can be no question—and the right of appeal is in abeyance until the sale is perfected, and the different collateral equities between the Railroad Company and other parties are settled, great mischief might ensue.

If this Court *should* find that Bronson & Soutter are entitled to their whole claim, and in the meantime the property is sold and out of their control, how would their success benefit them? It would be a victory barren of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for purchasers at a judicial sale are protected.

A rule, from which consequences so injurious to the rights of parties litigant would necessarily result, has never received the sanction of this Court

This decree is not final, in the strict technical sense of the word, for something yet remains for the Court below to do. But, as was said by Chief Justice Taney, in *Forgay et al.* vs. *Conrad*, (6 How., 203), "this Court has not therefore understood the words 'final decrees,' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

In the case of *Ray* vs. *Law*, (3 Cranch, 179), and *Whiting* vs. *The Bank of the United States*, (13 Wheaton, 15), this Court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The Court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled, and the subsequent proceedings were simply a means of executing the decree.

But, in denial of the right of appeal, it is said that a cross bill filed by leave of the Court is undetermined. This cause was heard and determined on the pleadings then existing, and no cross bill was pending, although the litigation had been protracted beyond two years. It is true that the Court, on the 7th day of January, 1862, and before the decree was passed, gave leave to the "defendants, Sebre, Howard, Graham, and Scott, the Milwaukie & Minnesota Railroad Company, and any other defendants who have liens subsequent to those claimed by Selah Chamberlain, to file a cross bill against said Chamberlain, contesting the liens under the lease or assignment, or judgment claimed by him in his answer—provided said cross bill should be filed by the 1st of February, 1862."

The bill was filed on the 1st of February, after the decree of foreclosure was made and sale of the premises was ordered, and Bronson & Soutter were made parties, although there was no order of the Court permitting it to be done, and process was regularly issued and served on them.

It is an independent proceeding, instituted by certain lien creditors of the road, who were defendants in the original suit, seeking to invalidate a prior lien set up by Chamberlain, another

defendant, in his answer. It can affect in no wise the right of Bronson & Soutter to foreclose their mortgage, and has no bearing on the legitimate questions presented for the consideration of the Court in the bill filed by them for that purpose. Such must have been the view entertained by the Judge of the District Court, for we cannot suppose that he intended to embarrass the parties to the original suit, after it was ended, by allowing the defendants to that suit to litigate their own claims to the injury of the original complainants. It is proper to say, that we do not approve of the practice of filing a cross bill after the original suit has been heard and its merits passed on. If any of the defendants in this suit wished to have the equities between themselves settled without instituting an original suit for that purpose, they should have applied to the Court at an earlier stage of the litigation, and not waited until the pleadings were perfected, proofs taken, and the cause, after two years of delay ready for hearing.

The motion is overruled.

SUMNER ET ALS. *vs.* HICKS ET ALS.

1. An assignment by an indebted party for the benefit of creditors in trust that the assignee shall sell the property, "on such terms and conditions, as in his judgment may appear best and most for the interest of the parties concerned," has been held by the Supreme Court of Wisconsin to be fraudulent and void.
2. In cases involving the construction of a State statute, this Court is bound to follow the judgment of the highest judicial authority of the State.
3. If a debtor makes an assignment, which is void, and afterwards —but before any creditor has acquired a lien—makes another which is free from objection, the latter assignment is valid.

Appeal from the District Court of the United States for the District of Wisconsin.

Mr. Smith, of Wisconsin, for Appellants.

No counsel appeared for Appellees.

Mr. Justice SWAYNE. This is a suit in equity, having for its object, to set aside two assignments made by the defendants, Henry Hicks and Asa Hicks, to their co-defendant, Forbes.

The appellants are the complainants in the bill. They have recovered judgments at law against Henry and Asa Hicks, upon which executions have been returned unsatisfied.

The first assignment was executed on the 4th of January, 1858. The conveyance of the property is followed in the instrument by this provision: "In trust nevertheless, and to and for the following uses, interests and purposes, that is to say, That the said party of the second part shall take possession of all and singular the lands, tenements and hereditaments, property and effects hereby assigned, and *sell and dispose of the same upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned*, and convert the same into money.

The second assignment bears date on the 6th of May, 1858. It is declared "to be made and entered into for the express purpose of correcting and explaining the true intent and meaning of a like indenture made and executed between the same parties, on the 4th day of January, A. D. 1858, and which said last described instrument as corrected shall read as follows:"

Then follows the body of the instrument, which is the same with that of the prior assignment, except that in the clause authorising the assignee to sell and dispose of the assigned property, the words "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned" are omitted.

The first assignment was executed only by the assignors. The second recites that it is between Henry Hicks and Asa Hicks, of the first part, and Forbes, of the second part; and it is executed by all the parties.

The Statute of Wisconsin upon the subject of fraudulent con-

veyance is substantially the same with that of the 13th of Elizabeth, chapter 5.

The Supreme Court of the State has held that such a provision as that referred to in the first assignment renders the instrument fraudulent and void as against creditors. *Keep* vs. *Sanderson*. 12 Wis., 362.

In cases like this, involving the construction of a State statute, this Court is governed by the judgment of the highest judicial authority of the State. (*Leffingwell* vs. *Warren*, decided at this term.) This ruling of the Supreme Court of Wisconsin is sustained by numerous adjudications in other States. 2 Seld., 510. 6 Seld. 691; 17 New York, 21; 21 New York, 168; 2 Duer, 533; 24 Illinois, 257; 11 Md., 173.

There are conflicting authorities upon the subject of great weight. 6 O. S., 620; 7 Paige, 272; 11 Barb., 198; 4 Sandf., S. C., 252. See also the dissenting opinion of Brown, Justice, in *Benedick* vs. *Post, et al.*, (12 Barb., 168.) The question, as an original one, is not before, us and we express no opinion upon it.

The Statute of Elizabeth was declaratory of the common law. In the absence of such legislation the common law would have accomplished the same results. Twyne's case, (3 Coke, 80. S. C., 1.) Smith's L. C., 1. *Codagan* vs. *Kennet*, (Cowp., 434.) *Wheaton* vs. *Sexton*, 1 Amer. L. C., 68; 1 Cranch, 316; 1 Binney, 514, 523; 4 McCord, 295.

It is not claimed that when the second assignment was executed any creditor had acquired a lien upon the property covered by it.

That assignment is free from the vice which was fatal to its predecessor, and is valid. 11 Illinois, 503; 16 Pick, 247; 28 Vermont, 150; 2 Ed. C. R., 289. This proposition is so clear, upon reason and authority, that it would be a waste of time to discuss it.

None of the authorities relied upon by the counsel for the appellant are in conflict with this decision.

In one of them the assignee did not join in the execution of the second instrument, and it did not appear that he had ever

assented to it. In the others, creditors had interposed and intervening rights had attached to the property.

"It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto.*" 4 Kent's Com., 559; 1 John. C. R., 136; 15 John. R., 571; 2 Edwards C. R., 289; 1 Sid., 133; Amer. L. C., 82.

The Court below dismissed the bill. We think there is no error in the decree, and it is affirmed with costs.

WRIGHT *vs.* BALES.

The statutory enactments of the States of the Union, in respect to evidence in cases at common law, are obligatory upon Judges of the Courts of the United States, who are bound to apply them as rules of decision.

Error to the Circuit Court of the United States for the Southern District of Ohio.

On the 31st of May, 1859, Matthias B. Wright and John Conner brought trespass on the case in the Circuit Court of the United States for the Southern District of Ohio, against Moses Bales, alleging in their declaration an infringement by defendant of a certain patent right to make and vend a draining plow of their invention. The defendant pleaded not guilty. Verdict for defendant, with costs. Plaintiff, in his exceptions, assigned, among other grounds of error, the refusal of the Court to allow Wright, one of the plaintiffs, to testify in the cause. Writ of error issued April 2d, 1860.

Mr. Lee and *Mr. Fisher*, of Ohio, for Plaintiff in Error.

By the law of Ohio, the parties to a cause are competent witnesses in it. State laws of evidence are rules of decision in civil trials at the common law before Courts of the United States. Civil Code of Ohio, § 810; Act of April 12, 1858, amending

code; *McNiel* vs. *Holbrook*, (12 Peters, 84); *Sims* vs. *Hundley*, (6 How., 1); *U. S.* vs. *Dunham*, (Monthly Law Reporter, July, 1859); *Smith* vs. *Carrington*, (4 Cranch, 62).

No counsel appeared for Defendant in Error.

Mr. Justice WAYNE. The plaintiff in error seeks for a reversal of the judgment in this case, for errors alleged to have occurred upon the trial of it in the Court below, but our attention having been called to the rejection of a witness, we shall confine ourselves to that assignment of error, without considering such of them as relate to the merits of the litigation or to the admission of the deposition of A. B. Dickerson, taken *de bene esse*, as evidence in the case.

The error complained of is, that the Court erred in refusing to allow one of the plaintiffs, Matthias B. Wright, to testify as a witness in the cause.

The cause was tried in the Circuit Court of the United States, sitting at Cincinnati, Ohio. In the year 1853, the Legislature of that State passed a statute entitled "An Act to establish a Code of Civil Procedure," in which it is declared that "no person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime, but such entries or conviction may be shown for the purpose of affecting his credibility." This statute was in force at the time of this trial. Wright, one of the plaintiffs, was offered as a witness under it, but was rejected by the Court as incompetent to testify, by reason of his interest in the event of the suit, and because of a rule of Court, which it was said excluded such a witness from examination unless previous notice had been given to the opposite party of an intention to examine him.

It appears, however, whatever may have been the intended application of that rule, under the "code of civil procedure" or otherwise, that it had become inoperative by the repeal in the year 1858 of that section of the Ohio code which required such a notice to be given. The repealing Act of 1858 is a statute to

amend the 813th and 814th sections of the code of civil procedure.

The rejection of Wright, then, as a witness, for incompetency to testify in his own behalf, raises again, in this Court, the question whether the statutory enactments of the States of the Union, in respect to evidence in cases at common law, are not obligatory upon Judges in the Courts of the United States to apply them as rules of decision in the trials of such cases.

The 34th section of the Judiciary Act of the 24th September, 1789, (Statutes at Large), is in these words: "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as 'rules of decision' in trials at common law in the Courts of the United States, in cases where they apply." Meaning by the word trials, as this Court has said in *Wayman* vs. *Southard*, (10 Wheat.), matters of controversy, and not to executions and the mode of executing them. As to the application and the extent of the allowances of the laws of the States in such cases, this Court gave its interpretation of the 34th section very fully in *McNeal* vs. *Holbrook*, (13 Peters, 84). We then said: "We do not perceive any sufficient reason for so construing this Act of Congress as to exclude from its provisions those statutes of the several States which prescribe rules of evidence in civil cases in trials at common law. Indeed, it would be difficult to make the laws of the State in relation to the rights of property the rule of decision in the Circuit Court, without associating with them the laws of the same State, prescribing the rules of evidence by which the rights of property must be decided. How could the Courts of the United States decide whether property had been legally transferred, unless they resorted to the laws of the State to ascertain by what evidence the transfer must be established. In some cases the laws of the States require written evidence, in others it dispenses with it, and permits the party to prove his case by parol testimony; and what rule of evidence could the Courts of the United States adopt to decide a question of property but the rule which the Legislature of the State has prescribed? The object of the law of Congress was to make the

rules of decision in the Courts of the United States the same with those of the States; taking care to preserve the rights of the United States, by the exceptions contained in the same section. Justice to the citizens of the several States required this to be done, and the natural import of the words used in the Act of Congress includes the laws in relation to evidence, as well as the laws in relation to property. We think they are both embraced in it, and as by a law of Georgia the endorsements on these notes was made prima facie evidence that they had been so endorsed by the proper party, we think that the Circuit Court was bound to regard this law as a rule of evidence." The same ruling was repeated by this Court in *Sims* vs. *Hundley*, (6 Howard, 1), upon a question whether a notary's certificate, made evidence by a statute of Mississippi, was admissible in the Circuit Court of the United States for that State. We said, it is true that upon general principles of commercial law, this certificate would not be admissible. But it is made evidence by the statutes of Mississippi; and the rules of evidence prescribed by the statute of a State are always followed in the Courts of the United States when sitting in the State in commercial cases as well as in others.

Since these decisions were made, the Judges of the United States Courts have administered the laws of evidence of the States in conformity with them, and there was error in this case by the Court below for not having done so. For such ruling, we direct that the judgment be reversed and order a *venire facias de novo.*

OGILVIE ET AL. *vs.* KNOX INSURANCE COMPANY ET AL.

1. The creditors of an indebted corporation may have the aid of a Court of Equity against such corporation and its debtors, to compel the collection of what is due to it, and the payment of the debt it owes.
2. Where a bill for that purpose is brought by some of the creditors and prosecuted to a decree, and afterwards other creditors get judgments, and are permitted, by the Court, to come in as parties, with the averment, that there are also other debtors of the corporation, who should be compelled to pay for their benefit, the Court cannot make a decree, settling the principle of the distribution, until the assets are collected, and the amounts received from the different classes of debtors ascertained.
3. A decree made before the funds of the corporation are collected, that all the moneys recovered, or to be recovered, shall be distributed among the original complainants, and the several persons who have filed their petitions to be made parties, and appointing a Master to state an account, is not a final decree in the cause.
4. If the original complainants appeal from such a decree on the ground that it is unjust to them, the appeal must be dismissed as premature.
5. The Court will not be in a condition to make a final decree, until all the facts upon which the rights of the parties depend are ascertained.

Appeal from the Circuit Court of the United States, for the District of Indiana.

Mr. Gillet, of Washington City, and *Mr. Judah*, of Indiana, for the Appellants.

Mr. Gookins, of Indiana, for the Appellees.

Mr. Justice GRIER. When this case came before us on a

former occasion (see 22 How., 380,) the decree of the Circuit Court dismissing the bill was reversed, and the record remanded, with instructions to that Court to enter a decree for the complainants against the respondents, severally, for such amount as should appear was due and unpaid by each of them on their several shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right might appertain.

At the May Term, 1860, of the Circuit Court, a decree was entered, in conformity with the judgment of this Court, ascertaining the amount of the judgments, due by the Insurance Company to the several complainants, and the several amounts due by each of the stockholders, respondents to the company. At the next November Term divers other creditors of the Company filed their petitions, setting forth that they also had become judgment creditors of the Company, and praying to be made parties to the bill, and suggesting that there were other persons indebted to the Company "whose indebtedness ought to be paid for the benefit of the petitioners;" that the amount found to be due from those against whom a decree has already been rendered was insufficient to liquidate the claims of the petitioners and other parties entitled to participate in the distribution of said funds; and praying that a Receiver might be appointed to receive and collect from the persons so indebted the amounts due by them, respectively, &c., &c. The Court then appointed a Receiver, according to the request of petitioners. But before the funds of the Company were collected, on the 7th of December, the Court entered a decree that all the moneys recovered or to be recovered under the decree made at last term be distributed among the original complainants and *the several persons* who had filed their petitions, praying to be made parties, complainants, &c., &c., and appointing a Master to state an account, &c.

The appellants contend that this decree is erroneous and unjust to the original petitioners. This may possibly be found to be true when the proper time comes to have it reviewed. But the appeal as well as the decree, is premature. There is no final

decree in the case. After the assets are all collected by the Receiver, so that the Master may ascertain the amount to be distributed, the question now proposed will be properly raised, and decided on exceptions to the Master's report. That report should state the amount of assets to be distributed, the amount collected from the original defendants, also the *other amounts* collected by the Receiver from persons not in the decree; whether the amounts collected from the parties respondent are sufficient to pay each of the original parties complainant? if not, how much to each; how much other assets have been collected by the receiver, and how much would be coming to each creditor on the hypothesis that all the assets are to be divided among all the creditors equally.

With these facts ascertained, the Court will be in a condition to make a final decree, which can be reviewed by this Court but not till then.

The appeal is therefore premature, and must be dismissed.

CALLAN *vs.* MAY.

1. Real estate being sold under a regular proceeding of the Circuit Court, an order of the same Court awarding process to put the purchaser in possession, is not a decree from which the tenant can appeal to this Court.
2. If the tenant had an agreement with the purchaser, which gave him the right to remain in possession, his remedy was a bill for an injunction, in which a final decree could be passed and an appeal legally taken.
3. The order of a Judge allowing an appeal, so far from being conclusive upon the Court, does not even imply that the Judge himself, has a settled opinion concerning the appellant's right.

Appeal from the Circuit Court of the United States for the District of Columbia.

The record brought up by this appeal showed that in 1862 a

cause was pending in the Circuit Court for the District of Columbia designated as *Statham et al.* vs. *Callan et al.* In that cause the Court made certain decrees and decretal orders in pursuance of which a sale was made by trustees of some real property in the City of Washington. The purchaser at the first sale made by the trustees was J. J. Waring, whose contract was annulled by his failure to comply with the terms of it. Another sale was then regularly made under the order of the Court to Austin Sherman, who assigned his right to John Frederick May, and May having fully complied with the terms of the sale, a final order ratifying and confirming it was made by the Court. May being by virtue of these proceedings the owner of the property in question, found John F. Callan in possession. Callan refused to go out, alleging that he was there under an agreement made between himself and Waring, the purchaser at the first sale, who had made default. He asserted also that May had confirmed this agreement of Waring, and made it binding upon himself by accepting the note which was due under it. May then presented his petition to the Court, setting forth the facts and praying for process to put him in possession. Callan answered the petition. The Court found that May was entitled to possession, and awarded him a writ of *habere facias possessionem*. Callan petitioned for an appeal to the Supreme Court. The appeal was allowed on special allocatur, by Mr. Justice Wayne, and the record brought up. May moved to dismiss on the ground that no appeal would lie from such an order as that made in his favor by the Circuit Court.

Mr. Carlisle, of Washington City, and *Mr. May*, of Maryland, for the motion.

Mr. Coxe, of Washington City, *contra*.

Mr. Chief Justice TANEY. This appeal must be dismissed. The application of May for process to obtain possession of the land was not a suit in which any final decree could be passed so as to give to either party a right to appeal. The proceedings in

the Circuit Court after its decree was affirmed in the case of *Statham, Smithson & Co.* vs. *Callan, et al.*, were nothing more than proceedings required to carry into execution that decree. And when May had become the purchaser, and the sale was ratified by the Court, and he had complied with the conditions of the sale, he was entitled, as a matter of course, to the process of the Court to put him in possession, The order of the Court directing process to issue is not such a final order or decree in a case as the Act of 1789 contemplates. It is nothing more than an order of process to carry into execution a final decree already passed in a case in which May was not a party.

If there was any agreement between May and Callan, after May became the purchaser, whereby the land was leased to Callan for a term which is not yet expired, the remedy of Callan was by a bill in Equity setting out the agreement, and praying that May might be enjoined from disturbing him in his posses sion. This would have been a new case in which a final decree might have been passed and an appeal legally taken. But such an agreement can furnish no ground for appeal from an order of the Circuit Court carrying into execution the mandate of this Court in the case of *Statham, Smithson & Co.* vs. *Callan et al.*, in which May was not a party and had no concern.

It seems to be supposed by counsel in the argument that the order of the Judge of this Court allowing the appeal was conclusive, and that its validity was not now open to dispute. But the allocatur of a Judge was never so considered. Writs of error to State Courts cannot issue without the allocatur of a Judge of this Court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly incon venient if it could be maintained, and would throw upon a single Judge the responsibility which properly belongs to the Court. And it does not by any means follow that the Judge who authorizes the appeal has made up his own mind that the party is legally entitled to it. He may, and no doubt often does, entertain doubts upon the subject, or may regard the point as new

and undecided, and upon which different opinions may be entertained, and in such cases he grants the appeal in order to bring the matter before the Court and enable it to decide for itself whether the case is or is not within their appellate jurisdiction as regulated by the Act of Congress. The allocatur of a single Judge certainly cannot enlarge the appellate powers of this Court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment.

This appeal must therefore be dismissed.

WRIGHT ET ALS. *vs.* SILL.

A question repeatedly argued and decided must be considered as no longer open for discussion, whatever differences of opinion may once have existed on the subject in this Court.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This case was submitted to the Court upon the record, without any argument, written or oral.

Mr. Justice SWAYNE. This is a suit in equity, brought here by appeal from the Circuit Court of the United States for the Northern District of Ohio.

The questions presented are, whether the 60th section of the Act of the Legislature of Ohio, entitled "An Act to incorporate the State Bank of Ohio and other Banking Companies," passed February 24th, 1845, constitutes a contract upon the subject of taxation, which is binding upon the State; and, if so, whether that contract is impaired by the subsequent Act of the Legislature, passed April 5th, 1859, entitled "An Act for the assessment and taxation of all the property in this State, and for levying taxes thereon according to its true value in money."

These questions came before this Court the first time in the *Piqua Branch of the State Bank of Ohio* vs. *Knoop*, (16 How.,

369), and were resolved in the affirmative. They have since been repeatedly before the Court, and have, uniformly, been decided in the same way. *Dodge* vs. *Woolsey*, (18 How., 331); *Mechanics' and Traders' Bank* vs. *Debolt*, (18 How., 380); *Jefferson Branch Bank* vs. *Skelley*, (1 Black, 436); *Franklin Branch Bank* vs. *The State of Ohio*, (1 Black, 474).

Whatever differences of opinion may have existed in this Court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluedd by these adjudications. The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose again to examine the subject.

The decree of the Court below is affirmed, with costs.

PARKER *vs.* WINNIPISEOGEE LAKE COTTON AND WOOLLEN COMPANY.

1. Where a party brings a bill in equity complaining of an injury for which he has a plain, complete and adequate remedy at law, the bill must be dismissed.
2. In the Courts of the United States, such an objection goes to the jurisdiction of the forum, and may, therefore, be enforced by the Judges *sua sponte*, though not raised by the pleadings or suggested by the counsel.
3. A decree affirmed dismissing a bill for a private nuisance in which the nature of the injury was not set out in such a manner as to show that the plaintiff was without a legal remedy.
4. Courts of Equity have concurrent jurisdiction with Courts of Law in cases of private nuisance, but to this jurisdiction of the former Courts there are some limitations; for many cases will sustain an action at law, which will not justify relief in equity.
5. In what cases a Court of Equity will enjoin a nuisance and in what cases not

Parker vs. *Winnipiseogee Lake Cotton and Woollen Company.*

Appeal from the Circuit Court of the United States for the District of New Hampshire.

Mr. Curtis, of Massachusetts, for Appellant

Mr. Hackett, of New Hampshire, *contra.*

Mr. Justice SWAYNE. This is a suit in equity. The appellant filed his bill to procure a remedy against an alleged nuisance. The Circuit Court dismissed the bill. He thereupon appealed to this Court.

It appears in the case that the appellant is the owner in fee simple of a certain parcel of land situated on the Winnipiseogee River, in the Village of Meredith Bridge. He owns, also, in connection with this real estate, the right to use "one-half of the water sufficient to carry wheels for operating a trip-hammer, grindstone, and bellows." He claims under Stephen Perley, whose title is undisputed. Perley conveyed the land and the whole of the water-power mentioned to Daniel Tucker, by deed bearing date February 27, 1808. Tucker conveyed the same premises, on the 14th of April, 1832, to F. W. Boynton. The deed of Perley is referred to in Tucker's deed for a description of the land and water right thereby conveyed. While the premises belonged to Tucker, the dam at Meredith Bridge was rebuilt. The amount to be paid by each of the parties interested in the water-power was fixed by arbitration. The arbitrators awarded that Tucker should pay two-twelfths of the cost of the dam "upon the Meredith side of the river," and he paid accordingly.

On the 29th of October, 1824, Boynton, by deed of that date, conveyed to Asa F. Parker. In this deed the water right is thus described: "Which said water privilege is the right to draw one-half of the water from the flume connected with the premises." On the same day Asa F. Parker, by deed containing the same description of the premises, conveyed to the appellant.

The Winnipiseogee river has its source in Winnipiseogee Lake. The Lake has its outlet at a place called *the Weirs*, six

miles above the Village of Meredith Bridge. The outlet was formerly, by a natural channel, from five to seven hundred feet in length. The water discharges itself from this channel into Long Bay—a sheet of water about four and a half miles long, and from half a mile to a mile wide. At the foot of Long Bay the water is again discharged by a channel about a thousand feet long into "Little Bay." At the outlet from Long Bay is Lake Village. From Little Bay the water is discharged into Sanborton Bay, by a channel about fifteen hundred feet in length. At the outlet of Little Bay is Meredith Village, where the premises of the complainant are situated. Little Bay forms the headwater of the dam from which the appellant's water-power is supplied. The water is discharged out of Sanborton Bay, at or near a place called Union Bridge, and thence pursues its course, about ten or twelve miles, to its confluence with the Pemigewasset, below which the united streams take the name of the Merrimac River. This river—receiving several affluents on its way—passes by and supplies with their water-power the manufacturing towns of Lowell and Lawrence.

The dam at Meredith Bridge was built prior to 1808. There is a dam at Lake Village, which was built in 1829.

After Perley conveyed to Tucker he cut a canal through his own land, tapping Little Bay, above the dam at Meredith Bridge, and discharging into the river, below the dam, at its entrance into Sanborton Bay.

The defendant is a corporation, created and clothed with its powers by acts of the Legislature of New Hampshire. Its stock is owned by the great manufacturing companies of Lowell and Lawrence, except a few shares, held for purposes of convenience, by individuals. The main object of its creation was to secure a more abundant and regular supply of water for the mills at those places. This was to be accomplished by making Lake Winnipiseogee a vast reservoir of water, to be accumulated and retained in wet weather, and to be drawn off and passed down the stream, as it might be needed, in dry weather.

The flow of water below the lake was thus to be equalized as far as practicable, throughout the year.

With a view to this object, the defendant has bought up all the water-rights relating to the lake, and all those upon the river above, and for some distance below, Meredith Bridge. Those holding such rights at that village have been compromised with, except the appellant. The answer avers that he was offered the same that was paid to others, and that he refused—seeking to extort an unreasonable and unconscionable sum.

The defendants made excavations at the Weirs in 1845–6, whereby the lake can be drawn down from four to six feet lower than was before possible.

They erected a new stone dam at Lake Villaga in 1851. By means of this dam they can arrest the flow of the water so as to raise it above the intermediate descents back to the lake, and raise the water in the lake and retain it there.

They have enlarged the Perley Canal and increased the flow of water through it. This was done in 1846.

In making their purchases and improvements, the defendants have expended about $300,000. All was done without any objection from the appellant.

It is admitted by the answer, that the defendants intend to make still deeper excavations at the Weirs, and that they have controlled and intend hereafter to control the waters of the lake, both by retention and discharge, so as to equalize at all times throughout the year, as far as practicable, the flow of water below the outlet of the lake.

The gravamen of the appellant's grievances is thus alleged in this bill:

"And the said defendants have thus caused a proportionate inequality in the quantity of water flowing in the river Winnipiseogee, by the premises of your orator greater than any inequality which naturally arose from the ordinary changes of the season, or from the ordinary fluctuations in the head of water in the said lake before the attempted regulation of the same by the said defendants—to the molestation, damage, and injury of your orator in the use and improvement of the said mill privilege and water-power aforesaid."

"And your orator further represents, that his said water-power

is damaged to the same extent as the equality of supply of water at all seasons is disturbed."

"And that the defendants, with the intent and design to deprive your orator of his just rights, have seized upon and taken possession of the waters of the said Winnipiseogee Lake and River, to regulate and control them as aforesaid, and to use the said lake as a reservoir, out of which to supply the Merrimac River with water in time of drouth, and to use the said Winnipiseogee River as a channel through which to regulate and control such supply, whenever and as often as the supply of water in the Merrimac from other sources may fail, or become insufficient for a motive power for the use of the manufacturing establishments situated thereon, and for the benefit, profit, and advantage of such manufacturing establishments, their owners or occupants, or parties interested therein, or some of them, and to the hurt and damage of your orator in the use, value, and capacity for improvement of his said water-power at Meredith Bridge aforesaid."

In reply to these allegations, the defendants say, "that they have, ever since said dam and excavation were made, used and occupied the same for the purpose of giving greater regularity and steadiness to the flow of water in said river, and to reserve and hold back the surplus water, which would, at wet seasons and during spring freshets, have otherwise run to waste, retarding and interfering with the operation and use of the mills upon said Winnipiseogee and Merrimac Rivers, and discharging the same at such times as the same was required in consequence of the low state of the waters in said rivers for the use thereof, and that the water of said lake and bay has been so managed and used as to be a material benefit and advantage to the mills upon said rivers."

"And the defendants deny that they have in any manner caused a proportional inequality in the quantity of water flowing in the River Winnipiseogee, by the premises of said complainant, greater either than any inequality which naturally arose from the ordinary changes of the seasons, or from the ordinary fluctuations in the head of water in the said lake

before the regulation of the same by the said defendants, to the molestation, damage, or injury of said orator, in the improvement of his said mill privilege and water-power. And said defendants further say, that said complainants' water-power is not damaged by anything which has been done by them, the equality of the supply of water being not otherwise disturbed by them than is in this answer hereinbefore set forth, and its supply being rendered more equal at times when it was formerly scanty, and the excess of water being prevented at periods of high water, which would not aid, but would retard by back-water the operation of said complainants' mill."

The issue between the parties is thus presented. Several other matters of defence are set forth in the answer. The view which we have taken of the case renders it unnecessary particularly to advert to them.

The appellant alleges an injury to his water-right commensurate, in extent, with the additional inequality in the flow of water in the river, which he alleges to have been caused by the works of the defendants.

They deny the injury, and claim that his water-power is improved. The appellant does not state in his bill how the injury is produced, nor in what it consists. The particular nature of the injury is unexplained. He complains neither of a diminished supply of water nor of back-water. We have looked carefully into the evidence upon the subject; the result is, that we are left in doubt upon which side lies the truth. We have failed to find those clear fact of rights upon one side, and wrong upon the other, which are necessary to quicken into activity the powers of a Court of Equity. We forbear to pursue this inquiry, because the case presents another ground, free from doubt upon which we prefer to rest our decision.

It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the Courts of the United States, it is regarded as jurisdictional, and may be enforced by the Court *sua sponte*, though not raised by the pleadings, nor suggested by

counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383. The 16th section of the Judicial Act of 1789 provides, "that suits in equity shall not be sustained in either of the Courts of the United States in any case where plain, adequate, and complete remedy can be had at law." This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law, is not "plain, adequate, and complete," or, in other words, where it is not "as practical and as efficient to the ends of justice and to its prompt administration as the remedy in equity." 3 Pet., 215. But where the remedy at law, is of this character, the party seeking redress must pursue it. In such case the adverse party has a constitutional right to a trial by jury. 19 How., 278.

The concurrent jurisdiction of Courts of Equity in cases of private nuisance, dates back to an early period in the growth of the English equity system. 1 Spence, 672. It has been greatly enlarged since the time of Lord Thurlow. 7 Vesey, 307, 308; 33 Cond. Eng. Ch. Rep. 236. It is now too firmly established to be shaken, but it is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrongdoer.

Many cases of private nuisance will sustain an action at law which will not justify relief in equity. 16 Vesey, 338; Story's Eq. Jur., sec. 925.

A Court of Equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. 2 Swanst., 335; 16 Vesey, 342; 2 Ver., 646; 2 Bro. C. R., 64; 19 Vesey, 168; 6 Paige, 83; Wat. Eden, 659, note.

It will also give its aid to prevent oppressive and interminable ligitation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction. Mitf. Eq. Pl., by Jeremy, 144, 145; Jer., Eq. 300; 1 Dick. 168; 16 Ves., 342; 6 J. C. R., 46; 6 Paige, 83.

A diminution of the value of the premises without irreparable injury is no ground for interference. 2 Bro. C. C. 65; 16, Vesey, 342; 3 M. & K., 169.

Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The Court will consider all the circumstances and exercise a careful discretion. Cr. & Ph., 283.

Where an injunction in such a case has been granted, and the complainant fails to proceed with diligence in his action at law, the injunction will be dissolved. 4 M & C., 498.

A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law. 1 Cox, 102; 2 J. C. R., 379; 3 J. C. R., 282; 6 J. C. R., 19; 5 Met., 8.

The better opinion now is, that it is only a fact to be considered by the Chancellor, in connection with the other facts of the case, by which his discretion is to be guided. *Wood* vs. *Sutcliff*, (8 Eng. L. & E., 217); *Sprague* vs. *Rhodes*, (4 Rhode I., 304).

"Until the rights of the parties are settled at law, only a temporary injunction is issued, to prevent irreparable injury." *Irwin* vs. *Dixon*, (9 How., 10).

This jurisdiction is applied only where the right is clearly established—where no adequate compensation can be made in damages, and where delay itself would be a wrong. 2 Swanst., 316; Angel on Wat. Courses, 475.

The case must be one "of strong and imperious necessity, or the right must have been previously established at law." 6 Barb. S. C. R., 160; 7 Barb. S. C. R., 400; 2 J. C. R., 164; 4 B. & C., 8; 37 New H., 254; 17 Maine, 202. The right must be clear and its violation palpable. 6 Barb. S. C. R., 160.

If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld. 8 Paige, 210; 1 Cooper's Sel. Cas., 333; 3 M. & K., 169; 5 Met., 8; 9 Gill. & J., 668; 3 J. C. R., 282; 2 Barb. Ch. R., 282; 1 Dev. Eq. R., 12.

After the right has been established at law, a Court of Chan-

cery will not, *as of course*, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case. 4 Rhode I., 301; 8 E. I & E., 217; 9 E. L. & E., 104; 18 Eng. Cond., Ch. R., 436.

The estate of the appellant in the water is an easement or servitude annexed to his land. As before stated, the excavation was made at the Weirs, and the Perley canal was deepened in 1846. The stone dam was erected in 1851. The appellant brought his bill on the 18th of September, 1855. During these intervening periods, according to his own showing, he slept upon his rights. 8 E. L. & E., 223. He does not allege either danger of irreparable injury, or of protracted litigation, or of a multiplicity of suits, as the ground upon which he seeks relief in equity. There is no warrant for such an averment. If he has been injured, his injury can be ascertained and fully repaired by damages in an action of law. A jury is the tribunal provided by law to determine the facts and to fix the amount, and they can best perform this duty. The fact that other proprietors have been paid bears upon this point. 8 E. L. & E., 222, 223. The appellant can have no standing in a Court of Equity until he has laid this foundation for relief. This objection is fatal to the case. We decide nothing else.

There are cases in which a Court of Equity will take jurisdiction and give a complete remedy without the previous intervention of a Court of Law. 6 Ves., 689; 1 McLean, 355; 39 New H., 186; 8 E. L. & E., 217; 4 Rhode I., 301; 4 M. & Cr., 433; 3 Hare, 593; 2 Coll., 431; 7 Hare, 221. But this case does not belong to that class.

The Circuit Court committed no error in dismissing the appellant's bill.

The decree below is affirmed, with costs.

LINDSEY ET AL. *vs.* HAWES ET AL.

1. This Court will enquire into the facts of a disputed entry of public land, and set aside or correct the decision of a Register or Receiver, or of the Commissioner of the General Land Office, as equity may require.
2. Where a party takes up and resides upon a tract of land within a quarter section, whose limits have been fixed by an authorized Government Survey, pays for it and receives his patent certificate from the proper officers, and by a subsequent survey it is found that the house of the pre-emptor is not within the tract for which he has paid, the Commissioner of the Land Office cannot, for this reason, set aside the sale.
3. In such a case the Government is bound by the original survey.
4. Where the house of a pre-emptor is built on the line dividing two quarter sections, his residence in it avails as the foundation of a pre-emption right in either.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Grant, of Iowa, for Appellants.

Mr. Scates, of Illinois, for Appellees.

Mr. Justice MILLER. This is an appeal from a decree of the Circuit Court for the Northern District of Illinois, in which the appellants here were complainants there.

The subject of the litigation is the legal title to the southwest part of the northeast fractional quarter of section No. 36, in township No. 18, of range No. 2, west, of the fourth principal meridian, in the county of Rock Island, Illinois. The course of the Mississippi river at this point is almost due west, and that portion of its waters which flows south of the island of Rock Island, divides the northeast quarter of section 36 into two parts, one of which, the smaller, is south of the stream, and the other constitutes a portion of the Island.

The section was surveyed in the year 1833 by Bennett, the

Government Surveyor, and the survey duly filed in the proper office. The meanders of the Mississippi river, the quarter section posts, and the area of the fractional quarters, were all given by the survey. It appeared by it, that the south line of the quarter section impinged upon the river at a point near the centre of the line, and thus divided that part of the quarter which was south of the river into two separate fractions. The computation of this survey gave the contents of the east fraction at 1 $\frac{87}{100}$ acres, and of the west fraction at 5 $\frac{17}{100}$ acres. It is this latter parcel which is in contest. In April, 1839, Thomas Lindsey made application to the Receiver and Register of the land office at Galena to purchase the land, claiming a right of pre-emption under the Act of 1838 by reason of cultivation and actual residence thereon, and having established his claim to the satisfaction of those officers, he received from them on the 3d day of June, 1839, the proper certificate stating the receipt of the purchase-money, and that, on its presentation to the Commissioner of the General Land Office, he would be entitled to a patent. Shortly after receiving this certificate, Thomas Lindsey removed with his family, across the river into Iowa, and died on the 14th September of the same year, a little more than three months after its date. The present plaintiffs are his heirs, and were all, at the time of his death, either minors or *femes covert*, except James A. Lindsey. No patent ever issued to Thomas Lindsey or his heirs on this entry.

In 1845 David Hawes claimed a pre-emption right under the Act of 1841 for the same fractional southwest part of the northeast quarter of section 36, and in December received the certificate of the Register and Receiver that he had purchased and entered it, and on March 1st, 1848, received from the Government a patent.

The object of the present suit is to compel from said David Hawes and the other defendants, who are his grantees, a convey ance to plaintiffs of the legal title thus obtained by Hawes from the Government.

As Hawes took his patent from the United States with full knowledge of the certificate previously issued to Lindsey, it is

quite clear that upon the facts above stated, without more, the complainants would be entitled to the relief prayed for in their bill. But the defendant Hawes, who alone has answered, sets up other facts upon which he relies as a full defence to the claim of the plaintiffs. There are in the record the depositions of some forty witnesses, besides letters and other documentary evidence, all of which have received the careful attention of the Court; although it will be found that the case must be decided upon a few facts about the truth of which there is but little conflict. These will be considered as we progress.

On the 9th August, 1845, James Shields, Commissioner of the Land Office, set aside the entry of Lindsey, ordered his certificate to be cancelled, and directed the Register and Receiver to hear proof of the right of David Hawes, and to adjudicate his claim.

They accordingly heard his proof, and gave him the certificate, on which he afterwards obtained his patent as before recited. It is claimed by the counsel of Hawes that this action of the land officers, including that of the Commissioner, was a conclusive and final adjudication of the matters now set up in plaintiffs' bill, and that the Courts of Law cannot go behind these proceedings to correct any injustice which may have been done to plaintiffs.

The proposition as thus broadly stated, and as necessarily so stated by defendant's counsel to avail him in this case, cannot be conceded. It appears from the evidence before us, that the ground on which the Commissioner set aside the entry of Lindsey, was, that there had been a mistake in the survey made by Bennett in 1833, and that by another survey made by order of the Commissioner in 1844, it was ascertained that the house in which Lindsey resided when he made his claim in 1839, was not on the land for which he received his certificate of entry from the Receiver and Register.

The order for this new survey emanated from the Commissioner of the Land Office June 1st, 1844, and the survey was actually made in the autumn of that year, five years after Lindsey's entry, and five years also after his death, and there is no

proof whatever that any of his heirs had notice of this survey, or of any intention on the part of the Commissioner to set aside Lindsey's entry; but the whole proceeding was *ex parte*. It is true that subsequently, when the claim of David Hawes to a right to enter this land came before the Register and Receiver, James A. Lindsey seems to have had some kind of notice; but this was given him in regard to an attempt on his part to enter this land for himself, on a claim of improvement made by himself, having, as is clearly shown, no relation whatever to the right established by his father, Thomas Lindsey. Nor did the other heirs of Thomas Lindsey have any notice of the proceedings by which David Hawes established his claim before the Register and Receiver. These heirs were not in any sense parties, to any of the proceedings, by which the title to the land which their ancestor had bought of the Government, was vested in David Hawes, and their claim annulled.

Under these circumstances we have no hesitation in holding that the action of the officers of the land office was *not* conclusive upon their rights, and that a Court of Equity may inquire into the proceedings by which the title was vested in Hawes, and afford relief if a proper cause for it is shown to exist. That this is the settled doctrine of this Court, a reference to a few of its decisions will show.

In the case of *Cunningham* vs. *Ashley et al.*, (14 Howard, 377). Cunningham appeared before the Receiver and Register, and claimed the right under the pre-emption laws, to enter the land which was the subject of controversy. These officers decided that he had no right to do so, and rejected his claim. He again and repeatedly presented his claim, and tendered the price of the land. His claim received the consideration of the Commissioner of the Land Office, of the Attorney-General, and of the Secretary of the Treasury, and was finally rejected. The defendants were permitted to enter the land, and receive from the Government patents for it. Justice McLean, in delivering the opinion of the Court, says, that this final decision of the Officers of the Department was the result of twenty years of controversy; and speaking in reference to the plaintiff's rights, he says: "They

were paramount to those acquired under the new location. Those rights were founded on the settlement and improvement in 1821, and on the acts done subsequently in the prosecution of his claim. Having done everything which was in his power to do, the law requires nothing more." Again: "So far as the new entries interfered with the right of complainants, they were void." "The officers of the Government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it. The Court decreed that the defendants should convey to Cunningham who had the paramount equity. In this case, which had been long contested, and had received the consideration of the Receiver, Register, Commissioner, Attorney-General, and Secretary of the Treasury, all of whom had concurred in rejecting plaintiff's claim, he had never received any certificate nor actually paid any money, yet the Court held that it would look into the equities of the case and set aside the acts of all these officers, because they had erred, to use the language of the Court, both as to the law and the facts to the prejudice of complainant. In *Barnard's Heirs* vs. *Ashley's Heirs*, (18 How., 43), this Court again decided that it would inquire into the facts of a disputed entry, notwithstanding the decision of the Register and Receiver.

But the clearest statement of the rule established by this Court on this subject, is to be found in the case of *Garland* vs. *Wynn*, (20 How., 8). Wynn's entry, which was the elder, had been set aside, and the money refunded and a patent certificate awarded to Hemphill, who assigned to Garland, to whom the patent issued. Wynn brought his suit in equity to compel from Garland the conveyance of the legal title, on the ground that these proceedings were illegal, and that he had the equitable right. Garland insisted that the Circuit Court had no authority or jurisdiction to set aside or correct the decision of the Register and Receiver, and that their adjudication was conclusive. Mr. Justice Catron, in delivering the opinion of the Court, says: "The general rule is that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and Government, regardless of the rights of others,

the latter may come into the ordinary Courts of Justice and litigate the conflicting claims. Such was the case of *Comegys* vs. *Vasse*, (1 Peters, 212), and the case before us belongs to the same class of *ex parte* proceedings. Nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, oust the jurisdiction of the Courts of Justice. *We announce this to be the settled doctrine of this Court.*" In *Lytle et al.* vs. *State of Arkansas et al.*, (22 How., 192), the same member of the Court, delivering its opinion, says: "Another preliminary question is presented on this record, namely, whether the *adjudication* of the Register and Receiver which authorized Cloy's heirs to enter the land is subject to revision in Courts of Justice, on proof showing that the entry was obtained by fraud, and the imposition of false testimony on those officers as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion."

We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by defendants on this branch of the case.

We now proceed to inquire into the grounds upon which the entry of Thomas Lindsey was set aside, and the application of David Hawes to enter the same land was allowed. It appears that some five years after Lindsey's entry was made, upon the suggestion of Silas Reed, that there was an error in Bennett's survey of this quarter, the Commissioner ordered a new survey to be made of that section. This survey was made for the Government by George B. Sargent in the fall of 1844. It differed from the original survey in two particulars, namely, that the southwest fractional quarter was found to contain $13\frac{22}{100}$ acres, instead of $5\frac{17}{100}$, and the south line of the quarter section was located so far north, as to leave the house in which Lindsey resided, when he made his entry, entirely south of the quarter.

The Act of June 22, 1838, under which Lindsey claimed his right of preemption and made his entry, provides, "That every actual settler of the public lands, being the head of a family,

over twenty-one years of age, who was in possession, and a housekeeper, by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of an act entitled an act to grant pre-emption rights to settlers on public lands." It is shown by the letter of James Shields, Commissioner of the General Land Office, dated August 9th, 1845, to the Register and Receiver at Dixon, that Lindsey's entry was set aside by him because, by the re-survey, Lindsey's house was not on the fractional quarter in controversy. We are not prepared to admit, that if the second survey be the correct and proper subdivision of that section into quarters and fractions of quarters, and that by this survey, (though otherwise by the former) the house of Lindsey was found not to be in the fraction pre-empted by him, the Commissioner could, for this reason alone, set aside, in this summary manner, the sale of the land made by the Government to Lindsay. It is to be remembered that the original survey of Bennett, was the survey of the Government; that it was made in 1838; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years, the Government had acted upon and recognized it as valid and correct, and above all had sold the land to Lindsey by this its own survey, received the purchase money and given him a patent certificate, five years before any suggestion was made of this error. The money thus received by the Government has never been returned, nor do we think it would vary the rights of the parties if it had been actually tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter section, affect the question of the precise locality of Lindsey's residence, as bearing on his right to enter that fraction as a pre-emption, the Government was bound by the original survey of Bennett.

We do not here deny the right of the Government which has sold land by the acre at a fixed price, to make a new survey before it parts with the title, and if there is more land than

was paid for, to require the deficiency to be paid before it issues a patent.

On that subject we decide nothing, because it is not necessary in this case. Lindsey's heirs were never notified of the additional number of acres found to be in the fraction, nor were they required, or permitted to pay for this increase.

The language of the Act of 1838, already quoted, certainly required of Lindsey that he should have possession, by personal residence thereon, of the land which he entered, and if he had not such residence, or rather such possession, the Commissioner was justified in vacating the entry. But this fact must be determined on the basis of Bennett's survey.

On this point a few facts found among the mass of testimony in the record, about which there is scarcely a dispute, will enable us to form a just conclusion.

The east and west lines which divide a section into north and south quarter sections, are not usually run out and marked by the Government surveyors; but instead of this, as they run the north and south lines, they set up on these lines, what they call the quarter section posts—that is, they mark the points where this line should begin and end. When Lindsey was about to make his pre-emption claim, in order to ascertain whether he resided on this fraction, he procured the County Surveyor of Rock Island County to come and run this quarter section line. Several of the witnesses who were present when this survey was made have testified in the case, and C. H. Stoddard, a practical surveyor of intelligence and candor, as shown by his testimony, also made a survey from Bennett's field notes since this suit was instituted. Some of the persons present when the survey was made by Baxter, the Surveyor of Rock Island County, looked through the compass and observed where the line struck Lindsey's house, and a notch was made on his stone chimney where the line was seen to touch it, which was there when the depositions were taken in this suit, and was identified by witnesses who saw it made. The fair result of all the testimony on this point is, that the house in which Lindsey resided was directly on this line, which would intersect the house so as to

throw perhaps the larger part on the other quarter, and a part something less than half, into this quarter.

It is proved that he had another building on *this* fraction wholly, which is sometimes spoken of as his stable, and sometimes as a blacksmith shop, in which he worked at that trade. It is also shown that the ground cultivated by him was exclusively on this fraction, and the proof of its cultivation and enclosure is quite clear. On these facts, was he within the meaning of the statute, in possession of this fraction by personal residence thereon?

The counsel for appellees has made a vigorous argument in support of the negative of this question. Assuming that Lindsey could not have a residence on both the northeast and southeast quarter sections at one time, and claiming that the case is to be governed by the analogies of a question of domicil in a case of conflicting jurisdictions, he has made an apparently strong case out of the fact, that the larger portion of the house is on the south side of the line.

This, however, is not a case of domicil under different Governments or conflicting jurisdictions. It is a question arising under the Government of the United States, and concerns a construction of one of its most benevolent statutes, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. The Government which made the law, owned both quarter sections, and was indifferent as to which should be sold to Lindsey, provided it was legally done. Lindsey's house was on both quarter sections. He lived or resided in all that house. So far as mere personal residence is concerned, we think he may be correctly said to have resided on both quarter sections. The law only required that he should personally reside on the quarter which he claimed to enter, and if he resided on both, then clearly he resided on this one.

But the language of the act makes *possession* the principal matter, and personal residence the qualifying matter. Leaving out the word housekeeper, which is not in question, the qualification of a person who can pre-empt under the act, is one 'who was in possession by personal residence thereon." Now

that Lindsey was in possession, is shown by his stable or blacksmith shop, by his enclosure and cultivation of the ground, or a part of it. When in addition to these facts, a considerable part of the house in which he and his family lived, was also on this little five-acre piece of ground, may it not be said that he had possession of it by personal residence thereon?

We are of opinion that on the true construction of the statute he had. It follows, from what we have said, that the patent certificate issued to Thomas Lindsey was rightfully issued by the Receiver and Register, that the act of the Commissioner in setting it aside was illegal, and did not destroy the right thus vested, that the land was not subject to entry by David Hawes, and that the patent obtained by him, was wrongfully and illegally issued to him, and that the plaintiffs are entitled to a conveyance of the legal title from him and his co-defendants.

The decree of the Circuit Court is therefore reversed, and the case remanded to that Court, with instructions to enter a decree in conformity with this opinion.

DREDGE ET AL. *vs.* FORSYTH.

1. An exception taken to the ruling of a Court, before the retirement of the Jury from the bar, may be drawn out in form and sealed by the Judge afterwards.
2. The time within which it may be so drawn out and presented to the Court, must depend upon the rules and practice of the Court, and the judicial discretion of the presiding Justice.
3. A patent for land adjoining Peoria, subject to the rights of all persons (French Villagers) claiming under the Act of 1823, confers, notwithstanding that reservation, a title in fee simple upon the patentee.
4. The title under such patent may be superseded and annulled by a survey under the Act of 1823, but it is in the meantime good on its face, and will afford protection to the patentee in possession under it.
5. The clause making the patent subject to claims under the Act

of 1823, was intended to exonorate the United States from liability in case a better title should be proved, and does not create a trust in the patentee for the use of any villager who may afterwards get it surveyed to himself.

6. If the patentee takes possession of the land, and holds it under the patent, his possession is adverse, and not subservient to a claimant under the Act of 1823.

7. Although a confirmed claim under the Act of 1823, is on its face a better title than that acquired under a patent issued before the confirmation of, but subject to that claim, yet if the patentee has been in possession seven years before suit brought the Illinois Statute of limitation will protect him.

8. A patentee of a quarter section is secure in his title to the whole of it, if he has been in possession of a part claiming the whole for seven years, though it has been subdivided into lots, upon some of which he had no actual residence or occupancy.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Ballance, of Illinois, for Plaintiffs in Error.

Mr. Williams, of Illinois, for Defendant in Error.

Mr. Justice CLIFFORD. This was an action of ejectment, and the case comes before the Court upon a writ of error to the Circuit Court of the United States for the Northern District of Illinois. Suit was brought in the Court below by the present defendant against John Dredge, John A. Keys and Jesse Hester, to recover possession of a certain parcel of land described in the declaration as part of claims forty-five and sixty-nine, and part of claims sixty-two and sixty three, in the village of Peoria, in the State of Illinois, and also by metes and bounds. Plaintiff alleged that on the first day of July, 1855, he was possessed of the described tract, and that the defendants on the following day entered into the premises, and have ever since that time unlawfully withheld the same. Defendants appeared and pleaded the general issue and by consent of parties their landlord, Charles

Ballance, was, on the twenty-third day of July, 1856, made a co-defendant in the suit. Issue being joined, the parties went to trial, and the jury returned their verdict in favor of the plaintiff, and judgment was subsequently entered on the verdict; but upon motion of the defendants, and satisfactory proof exhibited by them that they had paid all the taxable costs, the judgment was vacated and set aside by the order of the Court, and a new trial was granted. No further proceedings were had in the cause until the July Term, 1857, when the parties again went to trial upon the general issue. Title was claimed by the plaintiff under a patent from the United States to the legal representatives of one Antoine Lapance, who was an inhabitant or settler within the purview of the Act of the third of March, 1823, entitled "An Act to confirm certain claims to lots in the village of Peoria, in the State of Illinois. He accordingly introduced the patent, and deraigned his title from the patentees therein described. Recurring to the patent, it will be seen that it bears date the first day of February, 1847, and was issued for a certain lot of land surveyed and designated, as covered by claims sixty-two and sixty-three, in the southwest fractional quarter of fractional section nine, in township eight north, of range eight east, of the fourth principal meridian, in the State of Illinois. Survey on which the patent is founded was approved on the first day of September, 1840 and it is not controverted that the ancestor of the patentees was one of the inhabitants or settlers described in the Act of Congress under which the patent was granted. Two plats were also introduced by the plaintiff, which were objected to by the defendants, upon the ground that they were certified by the Surveyor of Public Lands, and not by the Secretary of the Treasury. One was a plat of the village of Peoria, and the other was a plat of claim or lot sixty-three; but the Court overruled the objections of the defendants, and the plats were admitted in evidence. Certain portions of Edward Cole's report, made to the Secretary of the Treasury, on the tenth day of November, 1820, were also offered by the plaintiff, to be read in evidence, as appears in the third volume of American State Papers, relative to the public lands. Objection

to the admissibility of the volume was duly made by the defendants, on the ground that it was not properly authenticated, but the Court overruled the objection, and so much of the report as relates to the claim in controversy was read to the jury. Various deeds also from the heirs of Antoine Lapance to the plaintiff, or to those under whom he claims, were given in evidence by the plaintiff, and he also introduced a duly certified copy of a certain Chancery proceeding for partition, which resulted in a decree of sale of the interests of several of the parties under whom the plaintiff derived his title as a purchaser. Those proceedings were introduced to show that the interests of parties owning one-third of the premises in common with the plaintiff were duly sold by a Commissioner of the Court in which the proceedings took place, and that the same became vested in the plaintiff, as a purchaser at a legal sale. Such was the substance of the evidence offered by the plaintiff, as more fully set forth in the transcript. On the other hand, the defendants claimed title under a patent dated the twenty-fourth day of January, 1838, as issued to Charles Ballance, granting to him the southwest fractional quarter of section nine, in township eight north, of range eight east, in the district of lands subject to sale at Quincy, Illinois, "subject, however, to the rights of any and all persons claiming under the Act of Congress of the third of March, 1823," to which reference has already been made. They accordingly gave the patent in evidence, together with a duplicate of the receipt given by the Receiver of the Land Office, and the certificate of the Register, on which the patent is founded. Relying on these evidences of title, the defendants also offered evidence tending to show that Charles Ballance, or those claiming under him, had been in possession of the premises, claiming title to the same, from 1842 to the commencement of this suit. Much testimony was taken as to the possession of the premises, but inasmuch as the plaintiff now concedes that the defendants occupied the same from 1842 to the commencement of the suit, the testimony will not be very fully reproduced.

On this state of the case the defendants requested the Court to instruct the jury: 1. That the title exhibited by them was

superior in point of law to that exhibited by the plaintiff. 2. That the title of the defendants was a regular chain of title, deducible of record from the United States, and if they believed from the evidence that the defendants, and those under whom they received the possession, had been in actual possession, by residence, of the premises more than seven years immediately preceding the commencement of the suit, and were still in possession when the suit was brought, then the plaintiff was not entitled to recover in this action. Other prayers for instruction were also presented by the defendants; but in the view we have taken of the case it will not be necessary to refer to any other at the present time. Both of these requests were refused by the Court, and the jury, among other things, were told: 1. That the defendant, Ballance, acquired no absolute title to the lot in question under his patent from the United States; but that the other title, under the Act of 1823, was the paramount title. 2. That in order to be protected under the law of 1835, he, or those claiming under him, must have had possession by actual residence on the land in controversy for seven years next preceding the commencement of this suit. Under these instructions, and others which need not be noticed, the jury found that the defendants were guilty of unlawfully withholding from the possession of the plaintiff so much of claim sixty-three as is covered by the southwesterly half of lot numbered one, in block forty-seven, in Ballance's addition to the town of Peoria.

1. Verdict was rendered on the 3d day of August, 1857, but the bill of exceptions was not filed in Court until a subsequent day in the same term; and it is contended by the plaintiff that the record does not show that the exceptions were duly taken before the jury retired from the bar of the Court. But the objection is entirely without merit, so far as respects the prayers for instruction presented by the defendants, and the instructions given to the jury, as will appear by an examination of the statement which immediately precedes the bill of exceptions, as well as by the closing paragraph of the same. Just preceding the formal part of the bill of exceptions is the statement in the record that "the following exceptions were made by the defend-

ants upon the trial of this cause," and that the same "were allowed by the Court;" and immediately following the instructions given to the jury is the additional statement, that the "defendants then and there excepted" to the decisions and rulings of the Court. Undoubtedly the rule is that the record must show that the exception relied on was taken and reserved by the party at the trial; but it is a mistake to suppose that it has ever been held by this Court that it must be drawn out and sealed by the Judge before the jury retire from the bar of the Court. Great inconvenience would result from such a requirement, and in point of fact there is no such rule. On the contrary, it is always allowable, if the exception be seasonably taken and reserved, that it may be drawn out in form and sealed by the Judge afterwards; and the time within which it may be so drawn out and presented to the Court must depend on the rules and practice of the Court, and the judicial discretion of the presiding Justice. Such was the rule laid down by this Court in *United States* vs. *Brietling*, (20 How., 254), and we see no reason to qualify it on the present occasion. See also *Phelps* vs. *Mayer*, (15 How., 160); *Turner* vs. *Yates*, (16 How., 28).

2. Certain exceptions were also taken by the defendants to the ruling of the Court in admitting evidence offered by the plaintiff, as before explained, but inasmuch as the objections are the same as those which came before the Court in *Gregg, et al.* vs. *Forsyth*, 24 How., 179, we do not think it necessary to give them any further examination, and they are accordingly overruled.

3. Repeated decisions of this Court also have settled the question that the presiding Justice was correct in refusing to instruct the Jury that the paper title of the defendants was superior in point of law to that of the plaintiff. Although the patent under which the defendants claim is the elder, yet as the patentee took it subject to the confirmed title under which the plaintiff claims, this Court has uniformly held, and now holds, that the latter, independently of any question of adverse possession, must prevail. *Bryan* vs. *Forsyth*, 19 How., 334; *Mehan et al.* vs. *Forsyth*, 24 How., 175; *Gregg* vs. *Tesson*, 1 Black., 150

4. Suit was commenced in this case on the 9th day of July, 1855, and the evidence shows that Charles Ballance, or those claiming under him, were in possession of the premises in controversy as early as 1842, and were also in possession when the suit was commenced. Ballance commenced building a dwelling-house on a part of the same quarter section in the year 1842, and in the early part of 1844 moved into it with his family, and since that time has continued to reside in that house. Some of the witnesses testify that he claimed to be the owner of this fractional quarter as early as 1852, and that he has cultivated part of it from that time to the date of the writ; but it will be sufficient to state that the evidence clearly shows that he has had his residence on the quarter section since the year 1844, and that he, or those claiming under him, have been in the possession of the lot in question in this case throughout the entire period of his residence in his present dwelling-house. Assuming the fact to be so, then, it is clear that the presiding Justice erred in refusing to give the second instruction requested by the defendants, as well as in the instruction given upon that subject. No person who has any right of entry into any lands, tenements or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity from the State or the United States, can make any entry therein under the limitation law of that State passed in 1835, except within seven years of the time of such possession being taken. Sess. Laws 1835, p. 42.

When the patent under which the defendants claim was issued, no survey of any lots granted to the inhabitants or settlers in the village of Peoria had been made. Those persons therefore held but an inchoate right, which must first be surveyed and designated before the right granted to them would supercede the title acquired under the defendant's patent. They might never make any claim, and in that event the other title would be valid. Consequently, this Court held in *Bryan et al. vs. Forsyth*, 19 How., 338, that, subject to that contingency, the patentee under whom the defendants claim took a title in fee till 1840, when the title to the village lots was by the survey and

designation then made, ripened into a better title; but the Court also held at the same time that the patentee was a fee simple title on its face, and as such was sufficient to afford protection to one claiming title under it, if accompanied by proof of such possession for seven years, as is required by the Illinois statute of limitation.

5. Reference is made by the plaintiff to the reservation contained in the patent, and the argument is, that the defendants held possession of the land subject to the rights of the plaintiff, and consequently that their possession was subservient and not adverse to the plaintiff's title. But the proposition cannot be sustained, as is obvious from the language of the patent. Fee simple title is granted to the patentee and his heirs of the described tract, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, subject, however, to the rights of any and all persons claiming under the before mentioned act of Congress. Looking at the language of the patent, it is clear that the saving clause was designed merely to exonorate the United States from any claim of the patentee or his assigns in the event that any other person should prove a superior title. Such was the view taken of that clause by this Court in *Mehan et al.* vs. *Forsyth*, 24 How., 178, and in several other cases involving the same question, and we have no doubt that such is the construction of the clause. *Gregg* vs. *Tesson*, 1 Black., 150. Applying these principles to the present case, the conclusion necessarily follows, that the presiding Justice erred both in refusing to instruct the Jury as requested, and in the instruction given upon that subject. *Gregg et al.* vs. *Forsyth*, 24 How., 174.

6. Where a quarter section, as in this case, has been subdivided by the occupant and claimant into lots, it is not necessary, under the Illinois statute, in order to secure the benefit of the limitation of seven years, that the claimant should have an actual residence on each lot of the subdivision in the sense in which those terms are ordinarily understood, but it is sufficient if he shows an actual residence for the entire period on some one of the lots claiming the whole under the same title, and

that the lot in controversy was and is in the possession of his tenant under his title, and pursuant to his claim. *Gregg* vs *Tesson*, 1 Black., 150; *Lindor* vs. *Kidder*, 23 Ill. R., 51; *Williams* vs. *Ballance et al.*, 23 Ill. R., 197; *Gregg et al.* vs. *Forsyth*, 24 How., 179. For these reasons the judgment of the Circuit Court is reversed, and the cause remanded, with instructions to issue a new venire.

KELLOGG *vs.* FORSYTH.

REYNOLDS *vs.* FORSYTH.

1. If an exception be seasonably taken and reserved, it may be drawn out and sealed by the Judge afterwards, and the time within which it may be so drawn out and presented to the Court, must depend on the rules and practice of the Court and the judicial discretion of the presiding Justice.
2. The doctrine held by this Court in *Bryan* vs. *Forsyth*, (19 How., 338,) *Mahan* vs. *Forsyth*, (24 How., 175,) and *Gregg* vs. *Tesson*, (1 Black, 150,) concerning the effect of the saving clause in patents for claims in Peoria, re-affirmed.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Ballance, of Illinois, for Plaintiffs in Error.

Mr. Williams, of Illinois, for Defendants.

Mr. Justice CLIFFORD. These are writs of error to the Circuit Court of the United States for the Northern District of Illinois. Both suits were brought in the Court below by the present defendant against the respective plaintiffs in error. They were actions of ejectment, and were respectively commenced on the 18th day of November, 1854, to recover possession of certain but different parts of claim numbered seven in the village of Peoria, as confirmed to Thomas Forsyth under the Act of Congress, approved the 3d day of March, 1823, entitled

an Act to confirm certain claims to lots in the village of Peoria, in the State of Illinois. In each case the defendants pleaded the general issue, and for the sake of brevity, it may be well to say, that the proceedings in the two suits, are so nearly alike that it will be unnecessary to refer to them separately, except in a few particulars, which will be specially noticed. Parties went to trial in both cases at the July Term, 1856, and the verdict in each, under the instructions of the Court, was in favor of the plaintiff, and the respective defendants excepted. Plaintiff claimed title in each case under a patent to the legal representatives of Thomas Forsyth, dated the 16th day of December, 1845, and it was admitted at the trial that the plaintiff had that title. On the other hand, the defendants in the respective suits claimed the premises under a patent issued to John L. Bogardus, dated the 5th day of January, 1838, and granting to him the southeast fractional quarter of section nine in township eight north, of range eight east, in the District, of lands subject to sale, at Quincy in the State of Illinois, subject, however, to all the rights of any and all persons claiming under the Act of Congress of the 3d of March, 1823, entitled as already described. Premises in controversy are included in that patent, and it was admitted at the trial that the defendants in the respective suits have had the actual possession of the land for which they are sued by residences thereon for ten years next preceding the commencement of the suits. Other admissions, as to the possession of the premises by the defendants, were made at the same time, but it is not necessary to refer to them in this investigation. Defendants in the first case requested the Court to instruct the jury that the title under which they claimed was a title deducible of record from the United States, and that the plaintiff, inasmuch as he admits that they had been in possession more than seven years before the suit was commenced, is barred by the Illinois Statute of Limitations; but the Court refused the prayer, and among other things instructed the jury that the entry and patent under which defendants claimed were subject to the rights of any and all persons claiming under the Act of Congress of the 3d of March, 1823, so that no one claim

ing under the patent, and by virtue thereof, could claim under the Statute of Limitations for seven years to have entered into the possession of the lot under the claim or color of title Prayers for instruction substantially the same were also presented by the defendants in the other case, and the record shows that they were refused by the Court, and that the instructions given to the jury were in all respects the same as those already recited.

1. It is insisted by the plaintiff, in the first place, that the bill of exceptions does not show that the rulings of the Court in refusing to instruct the jury as requested, and in respect to the instructions given, were properly excepted to at the time the rulings were made. But sufficient appears to show that the prayers for instruction were presented, and the instructions given before the jury retired from the bar of the Court, and the statement at the close of the bill of exceptions and immediately following the instructions given is, that the "defendants then and there excepted" to the instructions, rulings, and decisions of the Court. Evidently the objection is substantially the same as that considered in the case of *Dredge et al.* vs. *Forsyth*, decided at the present term, and for the reasons there given it is overruled. *United States* vs. *Brietling*, (20 How., 252).

2. In the second place, it is insisted by the plaintiff that the possession of the defendants were not adverse to the title of the plaintiff. He states the proposition, but furnishes no explanation of the grounds on which it rests. Unless it is founded on the saving clause in the patent of the defendants, there is nothing in either case to give it the slightest support; and if it is founded upon that clause, it is a sufficient answer to it to say, that it proceeds upon an erroneous view as to the legal effect of the patent. *Bryan et al.* vs. *Forsyth*, (19 How., 338); *Mahan et al.* vs. *Forsyth*, (24 How., 175); *Gregg* vs. *Tesson*, (1 Black., 150).

3. Suggestion is also made by the plaintiff that the title of the defendants is not such as is required by law to secure to them the benefit of the seven years Limitation Act of the State of Illinois, but the point has been so frequently ruled otherwise by the State Court, and by this Court, that we do not think it neces

sary to give it any further examination. Suffice it to say, that in our opinion the instructions requested should have been given, and those given should have been withheld. The respective judgments of the Circuit Court are accordingly reversed and the causes remanded, with instructions in each case to issue a new venire.

CONGDON, ET AL., AND TENNESSEE MINING COMPANY vs. GOODMAN AND BLEDSOE.

A controversy in which no right is claimed under the Constitution or laws of the United States, but which turns entirely upon the validity or interpretation of State Laws, is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment.

Error to the Supreme Court of the State of Tennessee.

The defendants in error in this cause were the Common School Commissioners of the Eighth Civil District of Polk County, Tennessee, who in that character filed their bill on the 18th of February, 1856, in the Chancery Court at Benton, to impeach and set aside a lease for ninety-nine years, made by their predecessors, of the Common School Section of land in that district, and a sale made of the same land under an order of the Circuit Court of that County. The validity of the sale and lease was impeached and maintained upon the authority of State laws. The Chancery Court dismissed the bill. On appeal to the Supreme Court of Tennessee, the decree was reversed and the case remanded for final proceedings. Defendants below thereupon sued out their writ of error in the Supreme Court of the United States.

Mr. Meigs, of Tennessee, for Plaintiff in Error.

No counsel appeared for Defendants in Error.

Mr. Chief Justice TANEY. This writ of error is directed to

the Supreme Court of Tennessee, and is brought to revise a decree of that Court which declared null and void a certain sale and lease of school lands in Polk County, under which sale and lease the plaintiffs in error claimed title to these lands.

The statement of the facts in the transcript will show that the validity of this sale and lease depended altogether upon the laws of the State, and the proceedings of the State authorities. The plaintiffs in error do not claim under any laws of Congress, or any authority exercised by the United States. On the contrary, they deny the authority of Congress to pass the Act of 1843, (which is the only Act of Congress referred to,) and claim that a lease for ninety-nine years, made by the School Commissioners under a law of the State, was valid, and passed the title for the term, although in direct opposition to the provisions of the Act of Congress. Such a controversy, where no right is claimed under the Constitution or laws of the United States, is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment. This writ must therefore be dismissed for want of jurisdiction.

RUSSELL *vs.* ELY ET AL.

1. In Wisconsin the fee of mortgaged premises, rests in the mortgagee or assignee only after foreclosure and sale: not upon the mere default of the mortgagor.
2. A deed in fee, executed by the mortgagor, subsequent to the mortgage-deed, but prior to the foreclosure, passes the legal title.
3. But if the mortgagee is in lawful possession of the mortgaged premises, after condition broken, he will not be turned out until the debt is paid.
4. Possession obtained by the mortgagee through an arrangement with the tenant of the mortgagor whose lease has expired, without the consent of the mortgagor, is not lawful possession.
5. It is not necessarily error for a Court to instruct the Jury,

that if the testimony of a certain witness is believed it will establish a specified fact, leaving to the Jury to believe or disbelieve the witness.

6. The propriety of such instruction depends upon the fullness, certainty and clearness of the testimony of the witness upon the point in issue.

7. A bill of exceptions which alleges that the instructions of the Court laid too large a stress upon the testimony of a particular witness, should embody the testimony, at length, or so refer to it as to make it part of the record: otherwise a Court of error must presume that it justified the instruction.

Error to the District Court of the United States for the District of Wisconsin.

The facts are fully stated in the opinion of the Court. It was argued by

Mr. Doolittle, of Wisconsin, for Plaintiff in Error.

Mr. Lynde, of Wisconsin, *contra*.

Mr. Justice MILLER. This was an action of ejectment in the District Court of the United States for the District of Wisconsin in which the defendants in error obtained a judgment against the plaintiff in error, for the possession of block 70, of the School Section of the City of Racine.

The legal title to this block was in David L. Barton, on the 24th April, 1851, and on that day he made a mortgage deed conveying said block to Floyd P. Baker, to secure the payment of a note for $1,400, due one year after date, and on the next day, the 24th of the same month, he conveyed it in fee to Clifford A. Baker.

The plaintiffs on the trial exhibited a regular chain of title from Clifford A. Baker to themselves, and the defendant proved himself to be the owner and holder of the note and mortgage above recited, and being in possession of the block sued for, claimed the right to hold it until the debt was paid. It appears further by the bill of exceptions, that plaintiffs traced their title through one Charles R. Dean, and testimony was given tending

to show that Charles R. Dean was a fictitious person, who never had any real existence. The only other fact shown by the bill of exceptions, necessary to an understanding of the case, is the statement of Thomas S. Baker, that from the summer of 1858, until the spring of 1856, he held possession of the property under a lease from plaintiffs, and then surrendered it to the defendant, without the knowledge or consent of plaintiffs.

The defendant on the trial excepted to the three propositions following, contained in the charge of the Court to the jury:

1. "If the defendant procured the possession and occupies it in pursuance of an arrangement, in the spring of 1856, with T. S. Baker, without the consent of the mortgagor, or of these plaintiffs, then he is not lawfully in possession."

2. "If the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him."

3. "The legal title, in the opinion of the Court, on the face of the deeds, is in the plaintiffs."

In examining the questions arising on these exceptions, it will be convenient to take up first, the one last mentioned. It is the province of the Court in trials by jury to construe instruments of writing and determine their legal effect, and if it was apparent that on the face of the deeds,—the legal title was in plaintiffs, it was not only the right of the Court, but its duty to so instruct the jury. Is it true, then, that the deeds read in evidence showed the title in plaintiffs?

The plaintiff in error maintains, that by the mortgage deed of D. L. Barton, of July 23d, 1851, the legal title passed to Floyd P. Baker, and that by the deed made July 24th, to Clifford A. Baker, nothing passed but the equity of redemption; and if he is correct in this the instruction was error.

Numerous authorities from English and American decisions are cited by counsel on both sides in reference to this point, but in the view which we take of the matter they become of little value, except those of the Wisconsin Court. These deeds were both made in Wisconsin, in reference to land lying in that State, and in their construction, must be governed by its laws. The Revised Statutes of Wisconsin, chap. 141, sec. 28, enact,

that "no action of ejectment shall hereafter be brought by a mortgagee, or his assigns, or representatives, for the recovery of the possession of the mortgage premises, until the equity of redemption shall have expired." Chap. 154, sec. 11, provides, that "in every case the mortgagor may retain full possession in trust for the mortgagee or purchaser of all premises mortgaged by him, *until the title shall absolutely vest* in the purchaser of such mortgaged premises, according to the provisions of this chapter."

The Supreme Court of Wisconsin, in the case of *Wood and Moon* vs. *Trask*, (7 Wis. R., 512), speaking of these provisions, and perhaps others in *pari materia*, says: "Our statute has essentially changed the rule of the common law, in relation to the position of the fee of the mortgaged premises, after condition broken. The fee does not vest upon default of the mortgagor, in the mortgagee, or his assignee. The fee only vests upon sale and foreclosure." In *Tallman* vs. *Ely*, (6 Wis. R., 257), the same Court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption; sec. 53, chap. 106, or in other words he must complete his title, before he shall be permitted to recover at law upon the strength of it."

These expositions of the statutes of Wisconsin are to be followed by the Federal Courts as rules of construction, and from them it results that the legal title did not pass to Floyd P. Baker by the mortgage deed of July 23d, but did pass to Clifford A. Baker by the deed in fee made the day after.

The instruction was therefore correct.

The next error alleged is based upon that part of the Court's charge embraced in the following sentence: "If the defendant procured the possession, and occupies it in pursuance of an arrangement in the spring of 1856, with T. S. Baker, without the consent of the mortgagor or of these plaintiffs, then he is not lawfully in possession." The truth of this proposition would seem to be a necessary corollary from the one just discussed. Indeed it would seem to be a clearer deduction from the statutes cited, than that made by the Supreme Court of Wisconsin, in

reference to the position of the fee; for if the mortgagee has no right to recover the possession by legal proceedings, it would seem that he should not be permitted in any other manner to obtain that possession against the consent of the mortgagee, or the person holding under him. We are, however, referred by counsel for plaintiff in error to the cases of *Gillett* vs. *Eaton*, (6 Wis. R., 30), and *Tallman* vs. *Ely*, (Wis., 257), as establishing a contrary doctrine. A careful examination of these cases does not sustain the proposition in favor of which they are cited, to an extent which will conflict with the instruction of the Court under consideration.

It is true, that in both of these cases, it is held that the mortgagee *lawfully in possession* cannot be turned out by ejectment brought by the mortgagor. In both the cases, the decision turned upon the fact that the mortgagees *were* lawfully in possession, and in both it is evident that the defendants originally entered with the consent of the mortgagor, either express or implied.

The language used in the second of the cases cited, namely, *Tallman* vs. *Ely*, a part of which has already been quoted in regard to the position of the fee, shows very clearly the distinction which was in the mind of the Court as to the *lawfulness* of the mortgagee's possession. The Court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, sec. 53, chap. 106, or in other words, he must complete his title before he shall be permitted to recover at law upon the strength of it. Still, if he *is lawfully* in possession after condition broken, he will not be turned out until his debt is paid."

This leaves still undecided the question as to what is lawful possession, and we concur with the District Court, that if the defendant in this case, although he may have been the holder of the mortgage and the debt secured by it, obtained the possession of the block in controversy, by an arrangement with the tenant of the plaintiffs, after said lease had expired, and without their consent, he was not lawfully in possession.

The remaining exception is to the charge of the Court, "that

if the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him" (Baker). In that part of the charge which immediately precedes the words objected to, the Court says: "The deed of Clifford A. Baker to Charles R. Dean is alleged to be fraudulently executed by Floyd P. Baker in the name of Clifford A. Baker. That he used Clifford's name without authority, and that Charles R. Dean was a fictitious person. The evidence of Botsford shows these facts *prima facie*."

It is manifest that if Charles R. Dean was a fictitious person, plaintiffs had no title, for they claimed under a deed from him. It is equally clear, that if the testimony of Botsford showed that fact *prima facie*, the testimony of any witness who proved the existence of Dean as a real person was very important, and required careful scrutiny; and the comments of the Judge on any such witness, or his evidence, should have been given with great caution, and should have left to the jury all that properly belonged to it. But we are unable to see from anything in this record that the Court exceeded its functions in the charge. It was certainly proper that it should call attention to Baker's testimony, as it had done to that of Botsford. Baker may have testified to facts, which if true, or if believed by the jury, made it so clear that the title passed from him to Dean, as to justify the Court in saying so. And if he did so testify, we cannot say that the conclusion thus stated by the Court, leaving as it did the right to believe or disbelieve the witness to the jury, was error.

It is true that this Court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said, and according to a well-known rule, this Court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction. What purports to be the entire deposition of Baker is sent up by the Clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made

a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties. Clerks who certify transcripts to this Court should know what does properly constitute the record they are to send up, as it is a matter which has been often decided, and which may be readily learned with a little attention.

The judgment of the District Court is therefore affirmed.

THE SHIP POTOMAC—*Simpson, Claimant; Baker, Libellant.*

1 Case of *The Steamer St. Lawrence*, (1 Black, 525,) reaffirmed.

2. The claimant of a vessel libelled for repairs, cannot be permitted in this Court to contest the amount of libellant's claim, except in so far as specific objections appear by the record to have been taken to it in the Court below.

3. Where a master found the amount due, but stated no account, and his report was excepted to as being excessive, not sufficiently proved, erroneous under the pleadings, and founded on illegal evidence, such general objections may justly be treated as frivolous, and if overruled and the case brought here on appeal, this Court cannot say that particular charges were wrongly admitted, or particular credits wrongly thrown out.

4. Where the libellant proved his demand by shop books, the Circuit Court might well consider the evidence in his favor stronger than the contrary opinion of experts taken *exparte* after the work was done.

5. The decree of the Court below is presumed to be right, and a record showing that it may possibly be erroneous, or raising a doubt upon conflicting evidence is not enough to reverse it.

6 If the contract was made and the work done by the libellant, his right to recover, in his own name, cannot be defeated by showing that he had a partner interested in the contract.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On the 23d of November, 1855, the libel in this cause was

filed in the District Court of the United States for the Southern District of New York, by Baker, a ship-wright and carpenter *in rem.* against the ship Potomac, to recover a bill of repairs The Potomac was a ship of more than five hundred tons, and was engaged in the general freighting business. She had just returned from a foreign voyage and was about to sail for Australia. The libel stated that the repairs were necessary and that without them she could not proceed to sea and earn freight and passage-money; that they were furnished on the credit of the vessel, and master and owners (the master was an owner); that the libellant had a lien upon her for them, and that the case was within the jurisdiction of the Admiralty.

The answer admitted the repairing the vessel, but not to the amount claimed, and did not deny the jurisdiction, the necessity for the repairs or the lien.

The District Court made a decree that the libellant recover the amount of his repairs, and referred it to a Commissioner to ascertain the amount. The Commissioner reported $3,996.18, including the interest. The claimant excepted to the report.

The Court overruled the exceptions, and made a final decree that the libellant recover the amount reported by the Commissioner.

The claimant appealed to the Circuit Court from the whole of the final decree.

The libellants moved the Circuit Court to dismiss the appeal on the ground that it had not been perfected. The motion was denied, on condition that the claimants deposit the amount of the decree in Court, which was done, and by order of the Court it was paid over to the libellants, on their giving a bond to obey the order of Court in the cause.

Much conflicting evidence was given upon the trial, the libellant proving his demand for work and materials from the books and accounts kept by his clerks in the ordinary course of business, while the claimant brought persons, said to be skilled in the business of building and repairing ships, to show that the amount expended upon the vessel, fell far short of that claimed

by the libellant. The Circuit Court affirmed the decree of the District Court and the claimant took this appeal.

Mr. Gillet, of Washington City, for Appellant.

Mr. Benedict, of New York, *contra.*

Mr. Justice GRIER. When the counsel prepared their briefs of argument in this case, they could not have seen the report of the case of "the Steamer St. Lawrence," (1 Black, 525), or they would have considered it labor lost to argue the same question of jurisdiction on the very same facts again at this term. The opinion of the Court in that case was unanimous; the question was fully discussed and the opinion delivered by the Chief Justice, and needs no further remark.

The appellant, in his answer, admits that the repairs were made to his ship by the libellant, but takes issue on the amount and alleges an agreement that the repairs to be made should not exceed a certain sum, less by one-half than the bill finally presented.

But it appeared clearly from the evidence, that although the libellant made an estimate of what would be the probable cost of the repairs, he did not contract to do the work for any given sum. The contract was to supply the timber and materials at market prices, and to receive certain wages per diem for each person employed. When the vessel was stripped, it was found necessary to make repairs on a much larger scale than had been at first estimated. The amount of libellant's bill of course far exceeded his original estimate. The report of the Master found the amount due, but stated no account. The exceptions to it were—1st "That it was for an amount far exceeding any amount of work performed." 2d. "That the libellant had not proved any work performed for which he was entitled to a decree." 3d. "That the libellant was not, under the pleadings, entitled to any decree whatever in his favor." 4th. "That Commissioner erred in admitting evidence," &c.

If the respondent wished to contest any of the specific charges of the account, he should have had the report referred back to the Master, with direction to state an account. The account returned by the Master should report the items objected to and whether they were allowed, and the testimony or reasons justifying his decision. To such a report the party could make specific exceptions, and such general objections as those stated might well be treated as frivolous.

As the record stands this Court cannot know what items of the libellant's account were allowed or disallowed, or excepted to; we cannot say that other credits should have been allowed, because we do not know whether they were allowed or not.

For anything that appears on the face of this record the judgment of the District and Circuit Courts are correct. The libellant proved his demand for work and materials furnished by the books and accounts kept by his clerks; and the Court may well have considered this better evidence than the opinions of experts, taken *ex parte* to undervalue the work and count the treenails, after the sheeting was replaced and the repairs covered with paint. It is not enough for the appellant merely to raise a doubt on conflicting testimony, that the judgment of the Court below may possibly be erroneous. But in this case he has not succeeded even in raising a doubt.

The judgment of the Court below is assumed to be correct till the contrary is made to appear. It is not sufficient to produce a record from which it does not appear whether it is right or wrong.

The objection that the libellant should have joined some unknown partner as a party to this libel has no foundation whatever.

The contract is proved to have been made and the work executed by the libellant. There is no evidence that he had a partner in any way interested in the profits of the contract; and if he had, it was not necessary to make him a party, as appeared by the case of *Law* vs. *Cross*, decided at last term. (See 1 Black, 533.)

Let the judgment of the Circuit Court be affirmed.

RANDALL *vs.* HOWARD.

1. The owner of mortgaged land made "a friendly arrangement" with the mortgagee to buy it in, ostensibly for his own use, but with the understanding that he was to hold it for the use of the mortgagor, as if no sale had been made. This was done to defeat the claim of a third party; and with that view the mortgagor confirmed the sale. The mortgagee and purchaser afterwards claimed the land as his own. *Held*, That the mortgagor cannot sustain a bill in equity to restrain the mortgagee from selling the land, and to enforce the understanding made before the sale.
2. Neither party can enforce against the other a contract made between themselves to injure a third person, in fraud of the law.
3. Nor will the character of such agreement be changed by showing that the claim of the third party, whose rights were to be affected by it was also fraudulent.
4. Where it appears on the face of a bill, that an agreement concerning an interest in lands set up by complainant is in parol, the defence of the Statute of Frauds may be taken advantage of on demurrer.
5. This Court has no jurisdiction on appeal to annul, revise, or change the decree of a State Court of general jurisdiction, having complete control of the parties and of the subject matter of controversy.
6. Where there is error in the proceedings of such a Court, a review can be had in the appellate tribunals of the State.
7. Where the decree is sought to be perverted and made the medium of consummating a wrong, the Court, on petition, or suppletal bill, can prevent it.

Appeal from the Circuit Court of the United States for the District of Maryland.

The appellants in this case filed their bill of complaint in the Circuit Court of the United States, for the District of Maryland, on the 18th of February, 1859, against the appellee, to which he demurred, and the Court sustained the demurrer. The case

came before the Supreme Court on appeal from this decree The allegations of the bill are stated in the opinion of the Court

Mr. Mayer, of Maryland, for Appellants.

Mr. Evans and *Mr Gale*, of Maryland, *contra.*

Mr. Justice DAVIS. This is a bill in equity filed in the Circuit Court of the United States for the District of Maryland by the appellants against the appellee, who interposed a demurrer, which was sustained by the Court below, and an appeal was taken to this Court.

The bill states substantially, that the complainant, John Randall, Jr., was on the 6th of April, 1854, largely indebted to the defendant, to secure which indebtedness both of the complainants executed a mortgage on lands in Cecil County, Maryland, which lands were held in trust for the complainant Letitia's benefit for life. That soon after the mortgage matured the defendant filed his bill in the Cecil County Circuit Court for foreclosure and sale; and, on answer filed, a decree was passed on the 15th of October, 1855, for the sale of the mortgaged lands, time being given until 9th of October, 1856, to bring the money into Court. That in April, 1856, in order to defeat an attempt (charged to be fraudulent) by other parties to obtain possession of part of the lands mortgaged, it was agreed that the defendant with the assent of the complainants should petition the Court for an immediate sale, which was done, and the time for sale changed, and a friendly arrangement was made with the defendant that he was to buy the property ostensibly for himself, but was really to hold it in security for the decreed indebtedness, upon the satisfaction of which the purchase was to enure to the benefit of the complainant Letitia. That the sale took place on 14th October, 1856, and the defendant was the purchaser, (the "friendly arrangement" continuing,) and that the property sold for less than its value on account of the general understanding that the sale was merely a formal one and not meant to divest the estate of the complainants. That the sale was ratified with

out objection from the complainants, under the assurance from the defendant that the property should, notwithstanding the ratification, stand as a security for the amount decreed, which was to be paid by instalments. That to perfect the form of sale, and to make it conform to the ostensible title of the purchaser, the complainants rented the property of the defendant. That having obtained an apparent title, the defendant has fraudulently determined to act as if he was the real owner, and is claiming the right to sell, and that through threats he extorted an agreement from the complainants, which was framed and meant to involve them in the recognition of his title. That the defendant, in furtherance of his object to oppress, has, by legal though irregular process, through the Sheriff of Cecil County, dispossessed the complainants.

The prayer of the bill is to restrain the defendant from disposing of the lands, and for the sale of so much of said lands as may be necessary to pay off the defendant according to the understanding prior to the purchase, and that the residue of the lands be conveyed to Mrs. Randall. There is also a prayer for general relief.

There are two questions presented by this record:

1. Upon the facts stated in this bill, are the complainants entitled in equity to the relief prayed for?

2. Has this Court jurisdiction?

The statements of this bill are vague and uncertain, frequently argumentative, and very rarely plain and direct. The whole bill lacks definitiveness. Agreements, friendly arrangements understandings, and fraudulent devices are freely spoken of, but the character of the agreements and the nature of the devices we do not learn. The bill seeks to establish a trust for the benefit of Mrs. Randall, growing out of certain proceedings in the Circuit Court of Cecil County, Maryland Are the complainants in a situatton to enforce the trust, if one is established? We think not.

The following allegations contain the charges relied on in the bill to establish the trust:

"And your orator and oratrix state and charge, that about

April, in the year 1856, in consequence of a fraud being attempted against your complainants, through devices involving the possession of part of the land mortgaged as aforesaid, it was deemed proper for counteracting said fraud, that, on a petition to be filed by said Howard in the case of said decree, your complainants should assent to a sale, (under friendly arrangements between said Howard, and then rendering such sale merely formal and nominal,) taking place forthwith, instead of being deferred to the period (the next October) provided by the decree.

And your complainants aver, that under their answer to such petition, which was filed, the time for the sale was by decree thus changed, and under the friendly arrangement and understanding aforesaid, and which was to the effect that said Howard was to become purchaser of said mortgaged property at a sale under the decree, but really to only hold it for securing the payment of the mortgage and decreed indebtment as aforesaid, upon satisfying which the property it was understood should enure, as provided by the terms of the said trust, for the benefit of your oratrix."

These allegations, stripped of their indefiniteness and vagueness, mean simply this, that the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgage lands, combined together, through the aid of the Court, to shorten the time of sale, and to cover up the real ownership of the property.

A fraudulent agreement was entered into to defeat, as is charged, "a fraud attempted against the complainants." If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

A Court of Equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim "*in pari delicto potior est conditio defendentis*" must prevail.

It is against the policy of the law to enable either party, in

controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story's Equity, vol. 1, sec. 298; *Balt.* vs. *Rogers,* (2 Paige, 156); *Wilson* vs. *Watts.,* (9 Gill, 356).

There are several other grounds decisive against the relief prayed for. We will, however, notice but one other. There is no averment in the bill that the defendant ever agreed in writing to hold the lands in trust for Mrs. Randall. In fact it is manifest from the whole bill that the agreement was a mere matter of conversation between the parties, and that no memorandum in writing was ever made. Inasmuch as it concerns an interest in lands, and is in parol, it is void by the Statute of Frauds, and appearing as it does on the face of the bill, the defence of the Statute of Frauds may be taken advantage of on demurrer. *Walker et al.* vs. *Locke et al.,* (7 Cushing, 90).

2. Has this Court jurisdiction. A conflict of jurisdiction is always to be avoided. Mr. Justice Grier, in *Peck* vs. *Jenness,* (7 Howard, 624), says: "That it is a doctrine of law too long established to require a citation of authorities, that where a Court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other Court.

"These rules have their foundation not merely in comity, but on necessity. For if one may enjoin the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare to proceed in the other."

The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil County Circuit Court, a Court of general jurisdiction having complete control of the parties and of the subject matter of controversy.

It seeks to annul a sale of lands made by virtue of a decree of the Cecil Court, sitting as a Court of Equity in a cause depending between these same parties; to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his

possession; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State Court.

If there was error in the proceedings of the Court, a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the Court, on petition or suppletal bill, can prevent it. If, as appears by the proceedings, the surplus money arising from the sale is still undisposed of, then the whole case is under the control of the Court, and no suppletal even is needed to prevent the wrong.

The decree dismissing the bill is affirmed.

NEBRASKA CITY *vs.* CAMPBELL.

1. Municipal Corporations upon which the duty is imposed to construct and repair, or to keep in repair streets and bridges, and upon which is also conferred the means of accomplishing such duty, are liable for any special damage arising from their neglect to perform it.
2. In an action for damages sustained by such neglect, evidence showing the business in which the plaintiff was engaged, its extent and the consequent loss arising to him from his inability to prosecute it, is relevant and pertinent, as enabling the jury to fix, with some certainty, the direct and necessary damages resulting from his injuries.

Error to the Supreme Court of the Territory of Nebraska.

John T. Campbell brought his action against Nebraska City in the Court of the Second Judicial District for Otoe County, and alleged in his petition that the defendant, being a municipal corporation, had, by its charter, the title and control of the streets, alleys, squares, wharves, and other highways and public grounds within its limits, and was bound to keep them in repair.

That the defendant was so bound to keep in repair a certain bridge on South street, across Tabb Creek; but, contrary to its legal duty, left that bridge without side-railing, and in other respects unsafe and defective, by reason of which, the plaintiff a physician, visiting his patients, in a buggy, was thrown from the bridge and greatly injured, so as to prevent him for a long time from practising his profession.

The City denied its legal liability for such damages under any circumstances, and averred that the plaintiff got his injuries by his own fault; for he was thrown over the bridge in consequence of the viciousness of his horse, which he was carelessly driving without a whip, and which had taken fright at a paper posted on the bridge by a third party.

The jury found a verdict in favor of the plaintiff for $3,000 damages, and after an unsuccessful motion by the defendant in arrest of judgment, the Court gave judgment on the verdict. The cause was taken, by the petition of the defendant, to the Supreme Court of the Territory, where the judgment was affirmed, and thence it came to this Court by writ of error sued out by the City.

Mr. Taylor, of Nebraska, for Plaintiff in Error.

Mr. Woolworth, of Nebraska, *contra.*

Mr. Justice NELSON. This is a writ of error to the Supreme Court of the Territory of Nebraska.

The suit was brought in the Court below by Campbell against the City to recover damages for injuries received by reason of a defective bridge in one of the streets in the City.

The charter vested in the City Council the title to all the streets within the corporate limits, and it is made their duty to construct and improve the same at the public's expense; for this purpose, and others, the counsel are authorized to levy a tax on all the taxable property within the City. This provision in respect to streets necessarily embraces all bridges within the limits of the City and constituting a part of the street.

There is also a general act referred to, which, among other things, confers upon all incorporated Cities exclusive jurisdiction over all streets, roads, bridges, and ferries within their corporate limits, and exempting the inhabitants from any assessment for road tax except by the corporate authorities of the same.

The law is well settled in respect to public municipal corporations, upon which the duty is imposed to construct and repair, or to keep in repair streets or bridges, and upon which is also conferred the means of accomplishing such duty, that they are liable for any special damage arising out of neglect in keeping the same in proper condition.

The principle was very fully considered at the last term in the case of *Weightman* vs. *The Corporation of Washington*, where all the authorities will be found collected and examined. 1 Black, pp. 39, 51, 52, 53.

The plaintiff was a practising physician, and in the course of the trial evidence was given, after objection, that he was engaged in extensive practice at the time of the injury, and also that it was a period of great sickness in the community.

The declaration states that the plaintiff was a physician at the time of the injury, and after describing the nature and extent of it, adds that by reason thereof, he was greatly bruised, sick and lame, and so continued for a long space of time, to wit, for the space of six weeks, and during all that time suffered great pain, and was prevented from transacting his ordinary business as a physician during that time.

Now, the evidence in question was relevant and pertinent, with a view to show the extent and amount of the ordinary business of the plaintiff in his profession, of which it is averred he was deprived during the time of his disability, and laid a foundation which enabled the jury with some degree of certainty to ascertain the direct and necessary damages sustained from the injuries.

In the case of *Wade* vs. *Leroy et al.*, (20 How., 34, 43, 44), which was an action for injuries to the plaintiff for carelessly navigating a ferry boat, the Court held that proof of the ordi-

nary business in which the plaintiff was engaged, and that he was largely engaged in it, was admissible and pertinent upon the question of damages, though the fact was not set out in the declaration. The proof was regarded as showing the direct and necessary loss or damage from the injuries sustained.

The case before us is broken into many points, and prayers to the Court for instructions to the jury, but those noticed above cover all that is material to dispose of it.

Judgment of the Court below affirmed.

THE UNITED STATES *vs.* CHABOYA.

CHABOYA *vs.* THE UNITED STATES.

A party claiming land in California produces no legal title, but bases his right solely on possession. It is shown that such possession as he had was temporary, partial, and subsidiary to the claim of another party whose rights he constantly recognized. *Held*, That this Court cannot confirm such a claim.

These were cross appeals taken from the District Court of the United States for the Northern District of California

Mr. Wills, of Washington City, for the United States.

Mr. Hepburn, and *Mr. Wilkins*, of California, *contra*.

Mr. Justice MILLER. These are appeals from the District Court of the United States for the Northern District of California.

The appellant, Petro Chaboya, on the 2d day of March, 1853, filed with the Board of Commissioners to settle private land claims in the State of California his petition to have confirmed to him two leagues of land in the County of Santa Clara, bounded as follows: On the north by the lands of José de Jesus Vallejo; on the east by the rancho of Antonio Suñol and the road from San José to the Valley; on the south by the Canada

del Aliso, (Colindante con,) Don Flagencia Higuera, and on the west by the estuary.

With the petition were filed certain papers showing an application by Chaboya, in 1844, to Governor Micheltorena, for this land, and a reference by the Governor to the Prefect for the necessary information under the colonization laws and the sub-Prefect's report.

There was also filed, as an exhibit, an incomplete espediente relating to a totally different tract of land, all the parts of which bear date in the year 1839.

The Commissioners rejected the claim, saying that no grant had ever issued, no proof was given of segregation of the land, none of possession, and none of cultivation. The case, however, was carried into the District Court by appeal, and the appellant filed his petition in that Court, in which, referring to his former petition before the Board of Commissioners for a more particular description of the land, he prays that their decree may be reversed and his title confirmed.

In the progress of the case in the District Court, it was discovered that the land on which the claimant lived, and to which alone he really set up any claim was not described in the petition, but was that mentioned in the second espediente above alluded to, and was twenty miles distant from the land for which confirmation was asked. Under these circumstances the claimant was permitted by the Court, on 15th of June, 1857, to file an amended petition, setting out these facts and a true description of the land claimed, which was called La Posa de San Juan Bautista.

After a large amount of testimony had been taken in reference to this last mentioned claim, and the case had come to a hearing, the Court held that it had never been presented to the Board of Commissioners, and that the District Court had no jurisdiction as to that piece of land, and that it was then too late, under the Act of 1851, to present the claim anywhere.

From this decree Chaboya appealed to this Court, and the record of the case up to this stage of the proceedings, constitutes case No. 181 of our docket for the present term.

But while this appeal was pending, the appellant procured the passage of an Act of Congress, approved April 25, 1862, which authorized the District Court to hear and determine his claim to La Posa San Juan Bautista, in the same manner, and with the same jurisdiction, as if it had been duly presented to the Board of Land Commissioners. Accordingly, after taking further testimony, the case again came to a hearing before that Court on the 6th of November, 1862, and a decree was rendered rejecting the claim to all of the tract of land, supposed to be about two square leagues, except five hundred acres of it, which had been allotted to him by the authorities of San Jose, and confirming to him that much of it.

From this decree he has also appealed to this Court, and the record which has been brought up, being a complete transcript of the case from its commencement, constitutes case No. 288 of the docket of this term.

The appellant does not in this Court claim that he has any right to the land described in his petition to the Board of Commissioners, as to which they decided against him; but he does insist that the last decree of the Court deprives him of a very valuable tract of land, to which he thinks himself entitled.

The main fact on which he rests his claim in this case is his long continued possession of the land. There is no pretence that there was ever any grant of the land by the Mexican Government, and if the claim is to be confirmed, it must be upon the equity growing out of that possession, and the circumstances connected with it. It is established by the testimony in the record, that Chaboya was residing in a house of very insignificant proportions, on some part of the tract, as early as the year 1837, and has continued so to reside to the present time. But, it also appears, that his right to reside there, and especially his right to any exclusive possession or use of tract known as La Posa de San Juan Bautista, was matter of controversy from that early time between himself and the residents of the pueblo of San Jose. These villagers claimed that the tract so named, was a part of the ejidos or common lands of the pueblo, on which the cattle of all the pobladores or villagers had a right to range.

and was particularly necessary to them on account of the water which it afforded. In his petition to the Governor asking a grant of this land, Chaboya alludes to his possession and to the resistance made to it by the residents of the pueblo, in these words:

"Therefore, I pray you to be pleased to grant me the ownership of what I actually possess, with my house and cattle, with the permission of the prefecture of this District, showing your Excellency that the reclamations which the residents of the pueblo have addressed against me to that Goverment are absolutely destitute of justice, since it is only made by four or five bad entertaining citizens, carrying of the view of the pueblo, since in nowise I prejudice their interests, and it happening to be vacant land, conformable to the law of colonization."

This petition was dated May, 10, 1839, and the Governor having regard to this same matter of disputed possession, made the following order, which was endorsed on the margin of the petition:

"*Monterey, May 20th*, 1839.

"Let the prefecture report on the present solicitation, arranging from hence that the interested party may be conserved in the possession in which he finds himself of the land solicited, as long as the suitable procedure is going on.

(Signed) "ALVARADO."

On the 25th May the Prefect reported as follows:

"SIR:—The petitioner ought to be excused from the usual procedure, since the prefecture in my charge has already taken and perhaps despatched it conformable to his solicitation, since the reclamation which the residents of the pueblo of the vicinity have made, and of which I verbally have informed you, have no other design than to remove Sir Chabolla from the place he has occupied for many years, on account of antipathy of previous arrangement, which absolutely are destitute of justice.

"Notwithstanding, your Excellency will act in the premises as you shall believe convenient.

"San Juan de Castro, 25th of May, 1839.

"JOSÉ CASTRO."

The foregoing papers were filed with the petition of claimant before the Board of Commissioners, and were all the documentary evidence so filed by him in relation to this tract of land. But in the progress of the case in the District Court, another paper was produced, and as it relates to this same matter of the possession and seems to have a close connection with those just mentioned, it may as well be inserted here. It is as follows:

"The citizen, Dolores Pacheco, justice of the peace of the pueblo of San Jose Gaudalupe de Alvarado.

"By superior order of the Señor Prefect of the First District, it is conceded to the citizen Pedro Chabolla that he inhabit the place named Posa de San Juan Bautista without building any house of foundation, and much less plant trees (plantar bienes raises) for the term of two years, subjecting himself to pay $6 annually, and he must assist in the work on bridge or any others by which he may be benefited.

"San José Gaudalupe de Alvarado, February 29th, 1840

"DOLORES PACHECO,

"PEDRO CHABOLLA."

Notwithstanding the report of the prefect Castro, that the claimant ought to be excused from the usual procedure, by which we suppose he meant the procuring of an informe, that the land was vacant, the Governor did not issue a grant.

His claim or right to the possession stood then in the same condition of dispute as between himself and the pobladores of San José that it had previously, when on the 29th of February, 1840, he entered into what may be termed a compromise with them, which is evidenced by the foregoing paper, signed by himself and the Justice of the Peace of that pueblo.

We can give to this paper no other construction than a renunciation by Chaboya of any *right* to the possession of La Posa de San Juan Bautista, and a consent to occupy it for two years under the authorities of the pueblo, paying them $6 annual rent, and submitting to the terms which they chose to impose, to prevent him from acquiring any permanent possession or interest in the land.

There is nothing in the subsequent history of his occupation

of the place to change the character of his possession. It is proven that while his cattle ranged over it, those of the residents of the village generally did the same.

On the contrary, there *is* strong evidence that this was his own construction of the character of his possession.

After the country came under the American Government, the authorities of San José determined to divide the ejidos or common lands of the pueblo, including this tract, among its residents, and in doing so allotted to Chaboya, as his share, five hundred acres around his dwelling. He accepted the instrument in the nature of a deed made to him by the Alcalde, and had it recorded. He was shortly after taxed by the authorities of San José for the entire tract of La Posa de San Juan Bautista, and it is distinctly proved by two witnesses, that he appeared before the proper officers to have the tax remitted, stating that he only claimed the five hundred acres allotted to him in the partition. The tax was accordingly remitted.

We think these facts show very clearly that the appellant never had any legal title to the land in question; that he never had any exclusive possession, beyond the five hundred acres which was allotted to him by the authorities of San José, and confirmed by the decree of the District Court; and that such possession as he did have was subsidiary to the claim of the authorities of the pueblo, and with recognition of their rights, and that the decree should be affirmed.

The decree of the District Court is affirmed in both appeals.

LEFFINGWELL *vs.* WARREN.

1. The Courts of the United States, in absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect as that are given by the local tribunals. They are a rule of decision under the 34th section of the Judiciary Act of 1798.
2. The construction given to a State Statute by the highest judicial tribunal of such state, is regarded as a part of the Statute, and is as binding on the Courts of the United States as the text.
3. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications.
4. The lapse of the time given by Statute for bringing an ejectment, not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder.
5. The Statute of Wisconsin limiting the time within which suits for the recovery of lands sold for taxes must be brought, begins to run from the time of the recording of the tax deed, whether possession has or has not been taken by the purchaser.
6. It is immaterial whether the sale and the deed be void or valid; it is sufficient that a sale has been made and the deed recorded, to bring the Statute into activity, and after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection.

Error to the District Court of the United States for the District of Wisconsin.

Mr. Lynde, of Wisconsin, for Plaintiff in Error.

Mr. Doolittle, of Wisconsin, *contra.*

Mr. Justice SWAYNE. This cause is brought here by a writ of error to the District Court of the United States for the District of Wisconsin.

In the Court below, Warren, the defendant in error, instituted an action of ejectment to recover the premises in controversy. Judgment was rendered in his favor. The defendant there is the plaintiff in error here.

The parties made an agreement as to the facts which is set forth in the bill of exceptions. It was thereby admitted upon the trial—

"That the plaintiff has a perfect chain of title to the land in question from the United States to himself; and that the defendant was in possession thereof at the time of the commencement of this suit; and that the land in suit is of the value of more than $2,000;

"That the County of Rock, on the 6th day of February, A. D. 1852, made and delivered to John M. Keep a paper purporting to be a tax deed of said premises, of which, and the certificate of acknowledgment, the following is a copy."

(Here follow the copies mentioned, which it is unnecessary to insert).

"(The plaintiff, however, not waiving any objection to said tax deed, which may appear on its face, or which may be made to appear by any other facts or evidence in the case).

"That said deed was recorded in the office of the Register of Deeds for Rock County, where said land is situated, on February 6th, 1852 (subject to the objection, however, which is reserved by the plaintiff on the ground, that said deed is not so executed and acknowledged as to be entitled to be recorded); that immediately thereafter said Keep sold said premises to said defendant, and that said defendant immediately thereafter entered into possession of said premises, and has been in possession ever since.

"That the plaintiff, on the 29th day of February, 1848, that being the proper time to pay the taxes on said land, including the tax for the nonpayment of which said tax deed purports to be given, wrote a letter and sent it by mail to the County Treasurer of said Rock County, who was the officer authorized by law to demand and receive all the taxes on said land, including the delinquent tax in question, stating that he wished to pay

the taxes on a list of lands mentioned, including the land in suit, asking for a bill of the same, showing the amount that he might remit; that said Treasurer on the same day received said letter at his office, and answered it, inclosing a bill corresponding with the receipt hereinafter given, stating that the inclosed was the bill called for by plaintiff's letter; that thereupon the said plaintiff remitted said amount to said Treasurer, who received the same, and returned to said plaintiff the said receipt herein after set forth the same day; and that at the date of the receipt the Treasurer and the plaintiff supposed that all the taxes on said lands were included in said receipt; but the parties agree that the particular tax for which the land was sold and deed given was not found by said Treasurer, and not included in said receipt.

"That after the date of said payment and receipt no demand was made of said plaintiff for payment of said delinquent tax, nor had plaintiff actual notice that said tax remained unpaid until more than three years after the recording of the tax deed, but that the premises were duly advertised for sale as by law required, and that said deed was recorded as hereinbefore set forth. That the said delinquent tax and costs amounted at the date of the sale to $19\frac{81}{100}$. That on the 11th day of April, 1857, said plaintiff deposited with the clerk of the Supervisors of Rock County the sum of $70\frac{50}{100}$, being the full amount of sale, interest, and costs, to redeem said land mentioned in the said tax deed, and that the deposit still remains there, there being no other unpaid tax on said land at that time.

"The following is a copy of the receipt given by said Treasurer, mentioned above, viz.:

"TERRITORY OF WISCONSIN, ROCK COUNTY,
"TREASURER'S OFFICE,
"*February 29th*, 1848.

"Received of the different owners, per Catlin & Williamson, agents, $25\frac{70}{100}$, in full of the taxes charged for the year 1847, on the following tracts of land in the County of Rock, W. T., consisting of the following items of tax, to wit: county, town, common school, territorial revenue, and

Leffingwell vs. *Warren.*

DESCRIPTION.	Section.	Town.	Range.	Acres.	Value.	County.	Town.	Ter. Rev.	Schools.	Roads.	Total.
E. ½ of S. W. ¼.....	34	1	11	80	160	54	165	42	....	..	$2 62
S. E. ¼.....	34	1	11	160	320	108	230	84	....	..	5 22
Lot No. 2.....	11	4	12	32.56	97 22/100	19	49	29	....	..	97
N. E. ¼ of N. E. ¼...	3	4	11	40.44	170	34	82	20	29	..	1 15
Lot No. 1.....	11	4	12	55	165 66/100	33	83	50	....	..	1 66
N. ½ of N. W. ¼.....	1	4	10								
S. W. ¼ of N. W. ¼..	1	4	10	40	233 14	86	88	43	70	..	2 87
Lot No. 3.....	15	4	12	64.35	193 58/100	39	96	58	677	..	8 70
E. ½ of N. W. ¼.....	14	4	11	80.	112	69	68	43	62	..	2 42
											$25 60

"WM. A. LAWRENCE, *Treasurer.*

"The first two tracts being the land in question."

It appears further by the bill of exceptions that instructions to the jury were asked by the plaintiff in error, which were refused by the Court, to which refusal he excepted; and that instructions were given to which he also excepted.

In the view which we have taken of the case, it is necessary to advert to those instructions only which relate to the Statute of Limitations.

They are as follows:

"The counsel for the said defendant did request the said judge to charge the jury as follows:

"1. That it being admitted by the parties that the defendant entered into possession of the land in question under a tax deed, and has held said possession under said deed more than three years before the commencement of this action, and it being also admitted that said tax for which said land was sold was never paid, they will find for the defendant.

"And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

"And the said judge did also then and there further declare and deliver his opinion to the said jury, that the deed is void on its face, as it recites that the several tracts therein described were sold collectively for a gross sum; and the deed being void

neither it, nor the subsequent possession by the defendant under it for three years after the recording thereof, is a bar to the plaintiff's recovery.

"To which said last-mentioned opinion and charge of the said judge the said counsel for the said defendant did then and there, and in the presence of the said jury, on behalf of the said defendant, duly except."

The Statute of Limitations relied upon by the plaintiff in error provides that—

"Any suit or proceedings for the recovery of lands sold for taxes, *except in cases where the taxes have been paid or the lands redeemed as provided by law*, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter." Revised Statutes of Wisconsin of 1849, chap. 15 sec. 123, p. 164.

The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789.

The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text. *Shelby* vs. *Guy*, (11 Wheat., 351); *McCluny* vs. *Silliman*, (3 Pet., 270); *Greene* vs. *Neil's Lessee*, (6 Pet., 291); *Ross* vs. *Duval*, (13 Pet., 45); *Massingall* vs. *Downs*, (1 How., 767); *Nesmith* vs. *Sheldon*, (1 How., 812); *Van Rensselaer* vs *Kearney*, (11 How., 297); *Webster* vs. *Cooper*, (14 How., 504).

If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications. *United States* vs. *Morrison*, (4 Pet.); *Green* vs. *McNeil's Lessee*, (6 Pet., 291).

This Statute of Limitations came under the consideration of the Supreme Court of Wisconsin, in *Edgerton* vs. *Byrd*, (6 Wisconsin Rep., 597). The Court held: "A tax deed informal and defective

in substance is admissible to show color of title in the defendant to bring him within the statutes of limitation." "Suits for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the lands redeemed according to law, must be commenced within three years from the time of recording the tax deed of sale, or no recovery can be had."

"Possession accompanied with a claim of title under a tax deed void for informality is adverse possession."

In *Sprecker* vs. *Wakeley et al.*, (11 Wis. R., 432), the subject came again under consideration. The Court re-affirmed the principles of the former decision.

In answer to the objection, that it should be shown the land had been regularly sold, and that the officer who executed the deed had authority to give it, they say:

"But if this is a correct view of the statute we fail to perceive any object in passing it. For when the public authorities have proceeded strictly according to law in listing the lands, assessing the tax, making demand for the same at the proper time and place, advertising for non-payment of tax, &c., and have observed all the requirements of the statutes up to the execution of the deed, surely the tax deed in that case must convey a good title, or our revenue laws are illusory, and the power of the Government to raise means by taxation upon the property of its citizens necessary for its own support and action is entirely impotent and vain. But we think a party cannot be required to show that his tax deed has been regularly obtained before he can claim the protection of this statute, since such a construction renders the law unnecessary and useless."

In *Hill* vs. *Kricke*, (6 Wis. R., 442), the same Court held further, that possession by the party claiming under the tax deed was not necessary to the running of the statute; that under the laws of Wisconsin, ejectment would lie against him without actual possession; and that the repeal of the statute after the bar became complete could not affect a title under it thus acquired.

It is not claimed that fraud is an element in the case. The facts show there was none. The only exceptions made in the

statute which prevent its application are where the taxes are paid before the sale, and where the land is redeemed within the time prescribed by law after the sale.

This case does not fall within either of these exceptions. We have no power to add to them. To do so, would be to usurp the function of another and a distinct governmental department. It would be legislation, and not adjudication. *Cocke & Jack* vs. *McGinnis*, (1 Martin & Yerger, 264 (Mr. Justice Catron's opinion); *Troup* vs. *Smith*, (20 J. R., 33); *Leonard* vs. *Pitney*, (5 Wend., 30); *Howell* vs. *Hair*, (15 Alabama, 194); *Beckford* vs *Wade*, (17 Vesey, jr., 87).

The lapse of the time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder. "It tolls the entry of the person having the right, and consequently, though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff." Buller's N. P., 103; *Stocker* vs. *Berney*, (1 Lord Raymond, 741); *Taylor* vs. *Hord*, (1 Burr. 60); *Barwick* vs. *Thompson*, (7 Term. Rep., 492); *Beckford* vs. *Wade*, (17 Vesey jr., 87;) *Moore* vs. *Luce*, (29 Penn. R., 260); *Thompson* vs. *Greene*, 4 Ohio S. R., 223); *Newcombe* vs. *Leavitt*, (22 Al. Rep., 631); *Wenn* vs. *Lee*, (5 Georgia Rep., 217; *Chiles* vs. *Jones, et al.*, (4 Dana, 483).

The instruction refused, and that given, refer to the fact of possession by the defendant below. The statute is silent upon that subject. It begins to run from the time of the recording of the deed, whether possession has or has not been taken. *Hill* vs. *Kricke*, (6 Wis. Rep., 447).

It was admitted by the stipulation of the parties, that the deed in this case was recorded on the 6th of February, 1845. This suit was commenced on the 2d day of October, 1857.

Upon this state of facts the Court below instructed the jury: "That the deed being void, neither it, nor the subsequent possession under it, for three years after the recording thereof, is a bar to the plaintiff's recovery."

This was clearly an error.

According to the rulings referred to, of the Supreme Court of the State, it is immaterial whether the sale and the deed be void

or valid. It is sufficient that a sale has been made, and the deed recorded—to bring the statute into activity—and after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection.

Statutes of Limitation are now regarded favorably in all Courts of Justice. They are "Satutes of Repose." Usually they are founded in a wise and salutary policy, and promote the ends of justice. *Tolson* vs. *Kaye*, (3 Brod. & Bing., 217); *Lewis* vs. *Marshall*, (5 Pet. 470.

The equities in behalf of the plaintiff below, are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court.

The judgment of the Court below must be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

LESSEE OF PARRISH *vs.* FERRIS, ET ALS.

1. A controversy once decided by a competent tribunal, cannot be re-examined by another court of concurrent jurisdiction, in a suit between the same parties or their privies.
2. The Statute of Ohio authorizes any person in possession of real property to institute a suit against any one who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest.
3. The judgment of a Court, in proceedings under this statute determines the merits of the plaintiff's title, as well as that of the defendant; and is conclusive whether adverse to one or the other.

Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Pugh and *Mr. Worthington*, of Ohio, for Plaintiff in Error.

Mr. Taft and *Mr. James*, of Ohio, *contra*.

Mr. Justice NELSON. This is a writ of error to the Circuit Court of the United States for the Southern District of Ohio.

The action was ejectment to recover possession of certain parcels of land situate in the county of Hamilton.

On the trial the lessor of the plaintiff claimed title to the premises under the will of Andrew Ferris and Elizabeth A. Parrish, his wife, who was a daughter and only child of Andrew Ferris.

The defendants by way of defence, claimed title also under the same will; and in addition, set up in bar of a recovery a previous suit between the same parties in the Courts of the State of Ohio, involving the same title, and in which a judgment or decree was rendered in their favor.

By a Statute of Ohio, it is provided that "an action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest."

In 1853, Francis A. Parrish, under whom the present lessor claims title, being in possession of the premises, instituted proceedings under this statute against the present defendants in the Court of Common Pleas of the County of Hamilton; and in his bill or complaint set forth that he was in possession, holding the same as absolute owner in fee simple, and with the legal title thereto of the premises in question, describing them, and charging that the defendants claimed to have some estate or interest in the same and prayed that the defendants might be compelled to show what estate or interest in the lands they or any of them might have; that the Court might determine and declare that the defendants, nor any of them, had any valid interest or estate therein; and would order that the title of the p'aintiff and his possession be established and quieted.

To this bill of complaint the defendants answered, and admi

the possession of the plaintiff, but deny that he held the same as absolute owner in fee simple, and with the legal title thereto; and then set up title in themselves under the will of Andrew Ferris.

This is the substance of the issue made between the parties It is very much amplified by the form of the pleadings adopted, which set out the evidence of the facts, instead of the facts themselves. The Court, however, look to the substance of the issue, and by that it appears that each party claimed title derived from the will of Andrew Ferris—the plaintiff claiming by devise through his wife, the only child of the testator; the defendants as his brothers and sisters, or their heirs. The title, whether in the one or the other, turned upon a construction of the will of Andrew Ferris, the common source of title.

The Court, after consideration, held that the plaintiff took the legal title in the premises, and that the defendants had no title or interest in the same, and gave judgment accordingly; whereupon the defendants appealed to the District Court, which, on account of the case involving difficult and important questions of law, sent it to the Supreme Court for determination.

That Court, after holding that no estate passed to the plaintiff under the will of Andrew Ferris and the devise of his wife, and that it passed to the defendants, the brothers and sisters, reversed the decision of the Court of Common Pleas and decreed a dismissal of the bill or complaint and remanded the cause to the District Court to have this decree carried into effect.

It will be seen from the above statement of the issue that the precise question in the former suit between these parties, or those under whom they claim, was involved and decided that is presented in the present one; and, further, that the decision of the Court could not have been rendered in favor of the defendants in that suit without determining it. In the former suit the question turned upon the construction of the will of Andrew Ferris, which is the question again sought to be raised in the present one and clearly upon well settled principles this adjudication by a Court of concurrent jurisdiction must be regarded as

final and conclusive between the same parties, unless some special ground is shown to take the case out of the rule.

It has been insisted by the counsel for the plaintiffs in error, that this Court is not bound by the decisions of the State Courts upon the construction of wills especially, unless that construction has, by the repeated decision of the Courts, become a fixed rule of property in the State; and several authorities have been referred to in support of the position. Without expressing any opinion on this question, it is a sufficient answer to say, even admitting the position contended for, it could not help the plaintiff, as it has no application to the present case. This Court acknowledges the rule, and has uniformly applied it, of the conclusiveness of a judgment of a Court of concurrent jurisdiction between the same parties or their privies upon the same question.

It has also been contended that the power conferred upon the Courts by the Statute of Ohio, under which the proceedings in the former suit took place, did not enable the Court to pass a definitive judgment between the parties upon the legal title. We have not been furnished with any construction of this statute by the Supreme Court of Ohio as to the extent and effect of this jurisdiction. We can only regret this, and give to the act such an interpretation as seems to us best warranted by its terms, aided by the practical construction derived from the present litigation in the State Courts.

The statute authorizes any person in possession of real property to institute a suit against any one who claims an estate or interest therein adverse to him for the purpose of determining such adverse estate or interest. Now it is quite apparent that the title of the defendant to the lands in question is involved under this act, and that the determination of the Court must be conclusive against him and all claiming under him as between the parties. If not, the act is of no effect. And it is difficult to see how this determination can take place without at the same time necessarily involving the determination of the plaintiff's title. The estate to be determined by the very terms of the act is an estate adverse to the plaintiff, thus raising an issue

between the estates or titles of the respective parties to the lands in controversy. Again, suppose the determination be, as it was in this case, in favor of the adverse estate, is the adjudication of no effect? Is it binding only when against this estate? We suppose not.

We have said we have been aided upon this point by the practical construction given to the statute in the proceedings of the Court below. The pleadings put in issue the legal title to the premises in dispute between the parties—each set up a claim to the title and relied solely upon it. The Court of Common Pleas passed upon this title, and upon nothing else, as did the Supreme Court on the appeal. It seems quite clear that both the counsel and the Courts in these proceedings understood the jurisdiction conferred upon them, as we have endeavored to explain it.

The Court of Common Pleas, which decided the question in favor of the plaintiff, not only adjudged that he had the legal title, but that the defendants had not. The Supreme Court, on the appeal, having reversed this judgment, directed that the proceedings be remitted to the Court below, and there be dismissed.

It was a dismissal of the plaintiff's suit upon the merits, and, of course, as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case.

Judgment of the Court affirmed.

THE UNITED STATES *vs.* GRIMES.

1. The assignee of a Mexican title was not prohibited from presenting his case to the Land Commissioners in his own name; and where he was assignee of the whole claim, that was his proper method of proceeding.

2. But where the land claimed was portioned out among many vendees, the proper party to the proceeding was the original grantee, who could produce the documents of title, and who best knew how to establish it.

3. Though the assignee of a portion of a claim is not absolutely estopped by a decree of this Court adverse to the title under which he holds, he cannot expect to shake that decree without producing new evidence which proves it to be erroneous.
4. The Government cannot be required to give two patents for the same land, one to the original claimant and the other to his vendee.
5. Where the original Mexican grantee filed his petition for a confirmation of the title, and several of his assignees petitioned also for the confirmation of the parts conveyed to them, the Commissioners should have consolidated all the cases.
6. It was their duty to establish the boundary as well as validity of the Mexican grant as between the original grantee and the Government, but not to arbitrate the disputes of the several assignees.

Appeal from the District Court of the United States for the Northern District of California.

On the first of March, 1853, Hiram Grimes filed his petition in the California Land Commission, on his own behalf, and as executor of Eliab Grimes, deceased, praying confirmation of a title to certain lands, derived from Mexico through and under John A. Sutter. On the 15th of January, 1856, the Land Commissioners rejected the claim, whereupon Grimes appealed to the District Court. On the 6th of March, 1857, that Court made its decree, reversing the decision of the Land Commission and confirming the title. From this decree the United States appealed. The facts necessary to an understanding of the case are stated in the opinion of the Court.

Mr. Wills, of Washington City, for Appellants.

No counsel appeared for Appellee.

Mr. Justice GRIER. The petitioner is assignee of John A. Sutter "of a part of the place called New Helvetia." Under this name Sutter claimed title to two several grants from the Mexican Government; one for eleven leagues, granted to him by

Juan B. Alvarado on 18th of June, 1841, the other for twenty-two leagues, called his "Sobrante grant," purporting to be issued by Micheltorena at Santa Barbara on the 5th of February, 1845. Many persons had purchased portions of this great tract. A separate application from each of those vendees to the Commissioners for a several confirmation of the portion assigned to him, would have caused great expense, trouble and delay. Accordingly, Sutter, very properly, filed his petition for the confirmation of these two grants, for the benefit of himself and his several assignees. His title has been fully considered and decided by this Court. (See 21 Howard, 178.) The first grant of eleven leagues was adjudged valid, the other was rejected. The patent to Sutter for the eleven leagues will, of course, enure to the benefit of all his vendees. Those who claim under the Sobrante title will take nothing. Whether the portions sold will be found within either or neither of these grants to Sutter, must depend upon surveys made, or to be made, since the confirmation of his grant by this Court. It is true, the assignee of a Mexican title may present his case before the Commissioners; and where he is assignee of the whole claim there may be no impropriety in it. But, if the land claimed has been divided out among a thousand vendees, as in this case, the proper party to the proceeding is the original grantee, who can produce the documents of title and who best knows how to establish it. As in the case of Neleigh, (1 Black., 298), who claimed a part of the grant to Castro, which had been rejected by this Court, we may say, that though the assignee is not absolutely estopped by a decree of the Court to which he was not a party, yet, as he has furnished no new evidence to show that decree erroneous, he cannot expect the Court to change it. If any part of the land for which he has petitioned is within the eleven leagues, the patent which has or will be given to Sutter will confirm his title, and further proceedings in this suit would be wholly superfluous. The Government cannot be required to give two patents for the same land, one to the vendor and another to the vendee. Where there are divers vendees under one original title, and the Mexican grantee has filed his petition before the Commissioners for a

confirmation of his title, and there are others, his assignees who have petitioned also, the Commissioners should have consolidated all the cases. The law does not require them to locate the boundaries of the several grantees or settle any disputes between them, or to give a thousand different patents to every several claimant of a town lot. It is their duty to establish the boundary as well as validity of the Mexican grant as between him and the Government, and not to arbitrate the disputes of the several assignees.

The Court below confirmed the whole claim of the petitioner, because it was within the thirty-three leagues which they had already confirmed to Sutter. But, as that judgment was reversed as to twenty-two leagues, the judgment in this case must have the same course. If any portion of his claim be found within the eleven leagues, he needs no further title; if it does not, he can have none.

The judgment and decree of the Court below is reversed.

ROTHWELL *vs.* DEWEES.

1. Where the surviving partner of an insolvent firm assigned certain lots of ground belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots, on the ground of any relation of trust or confidence subsisting between them and the assignee.
2. Where a party purchases property under the direction of, or on behalf of another, the purchase must be held to be in trust for the benefit of the principal, on repayment of the money advanced by the agent.
3. Where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase-money.
4. This rule is based upon a community of interest in a common title, creating such a relation of trust and confidence between

the parties, that it would be inequitable to permit one of them to do any thing to the prejudice of the other, in reference to the property so situated.

5 The reason of this rule applies as forcibly to the husband of a tenant in common as to one of the immediate co-partners.

Appeal from the Circuit Court of the United States for the District of Columbia.

Mr. Bradley, of Washington City, for Appellants.

Mr. Swan, of the District of Columbia, for Defendants.

Mr. Justice MILLER. The appellees in this case, who were the defendants in the Circuit Court, hold the real estate, which is the subject of this controversy, by inheritance from their father, William Dewees. The title of Dewees was a deed from the Corporation of Washington City, made August 29th, 1836, on a sale for taxes. It seems to be admitted on all sides that this deed vested the legal title in Dewees, and that it is valid in his heirs, unless the plaintiffs shall be permitted to redeem from said sale, and have the deed set aside for reasons set forth by them in their bill.

The property in question was conveyed by Robert Morris, in 1796, to Joseph Ball and Standish Forde. Forde was then doing business in Philadelphia as a merchant, in partnership with one John Reed, and died about the year 1806 or 1807, leaving the mercantile firm insolvent. Shortly after Forde's death, Reed, the surviving partner, conveyed all the partnership property to William Paige, of Philadelphia, by deed of assignment for the benefit of creditors; and in the schedule attached to the instrument of assignment is included the property thus conveyed by Morris to Ball & Forde. This instrument is dated December 12th, 1807.

On the 18th of September, 1833, William Paige, as assignee of Reed, surviving partner of Reed & Forde, entered into a written agreement with William Dewees, the defendants' ancestor, in reference to this property; the substance of which is briefly this:

Dewees was to take charge of the property, and redeem it from any tax sales which had already been made, and for which the time of redemption had not expired. He was to pay all future taxes, and all the expenses incident to sales of lots to be made by himself, for which he was furnished, with a power of attorney by Paige. The money for all these taxes and expenses he was to advance, except a sum of about two or three hundred dollars, which was supposed to be in the hands of the Treasurer of Washington City, belonging to Reed & Forde, arising in some way out of sales for taxes already made. His compensation for all this was, that, after deducting his advances and interest from the proceeds of sales made by him, he was to have one-third of the remainder of such proceeds.

It appears that Dewees acted fairly under this arrangement for about three years; making advances to redeem the property where it had been sold for taxes, and paying the accruing taxes, until he had advanced about $900. He then not having sold any of the property, nor realized anything from it in any other way, permitted it to be sold for taxes and bought it in himself, and took the corporation deed already mentioned of the 29th of August, 1836. He died on the 3d of September following. On the 10th of April, 1837, Paige, the assignee, by regular power of attorney, appointed Andrew Rothwell, one of the complainants, his agent, with authority to sell lots, to procure partition, and to make settlement with the heirs and representatives of Dewees. In 1841, Robert Smith was, by a decree of Court, appointed assignee in place of Paige, who had died; and in 1846 said Smith quit claimed, and released to Rothwell all the right, title, and interest which he had as such assignee, in the property now in dispute. The complainant, Rothwell, also procured deeds of conveyance to himself and his co-plaintiffs, Naylor and Smith, from several persons describing themselves as heirs of Standish Forde, of their interest in the same property.

Rothwell Smith, and Naylor then filed their bill in Chancery against the defendants, one of whom is Rothwell's wife, praying to be permitted to pay the sum with interest which William

Dewees had paid for his tax deed, and to have said deed set aside.

After the suit had progressed for some time, the other appellant, Robert S. Forde, filed a petition to be admitted as a party plaintiff, on the ground that he was a grandson and an heir-at-law of Standish Forde, and entitled to redeem for his share.

The Court dismissed or overruled the petition of Robert S. Forde to be made a party, and, on final hearing, it dismissed the bill as to complainants, Naylor and Smith, and decreed that Rothwell, in his purchase from Robert H. Smith, the assignee of John Reed, should be held to be trustee for himself and wife, and the other defendants, heirs of Dewees; and that the defendants should make contribution to him, in payment of the sum so paid by him to Smith, and for taxes afterward paid by him on the property.

From this decree Robert S. Forde and the original complainants appeal.

The first question to be considered arises from the action of the Court in dismissing Forde's petition. It is clear that if Forde had any title or interest in the property, it was a legal title, and no obstruction is seen to the assertion of that legal title against the defendants, in a Court of law.

That Court is the appropriate one to settle the conflict growing out of the legal title derived by Robert S. Forde from his ancestor, and the title claimed by defendants under the tax deed from the City of Washington. If he has any right to redeem from the sale for taxes it must be a legal right, which he can exercise without the aid of a Court of Chancery. In his petition asking to be made a party, he claims that Dewees must be considered as the agent of Forde's heirs, as well as the agent of Reed's assignee, under his agreement with Paige. This claim, however, cannot be sustained. The partnership of Reed & Forde was insolvent. The assignment was made for the benefit of creditors, and the claim of the assignee to the lots in question was adverse to the claim of Forde's heirs. The assignee had thus claimed them for nearly thirty years, when Dewees became the agent of Paige.

There can be no pretence then that Dewees was agent for Forde's heirs, or occupied towards them any relation of trust or confidence. No ground of equitable jurisdiction is perceived on which Robert S. Forde could assert his title in a Court of Chancery against the defendants, and his petition was properly overruled.

The next objection to the decree, namely, the dismissal of the bill as to complainants, Naylor and Smith, is based upon almost the same ground as that just considered. These parties have conveyances from individuals, who describe themselves in the deeds as heirs of Standish Forde, and in addition to this the bill alleges that they were partners in the purchase made by Rothwell from the assignee of Reed. If it be admitted that the parties who made the conveyance to Naylor and Smith were the heirs of Standish Forde, it would not place those complainants in any other or better position than that of Robert S. Forde. But Naylor and Smith being original plaintiffs, had an opportunity to prove their case at the final hearing, and failed to produce any evidence that their grantors were the heirs of Forde. It cannot be pretended that the recital of that fact in their deeds can be evidence against parties not claiming under them, and we have failed to discover any other evidence of it in the record.

Nor is there any evidence that these parties were interested in the purchase made by Rothwell from Smith, the assignee. If that fact, however, were established, we do not see that they could claim to occupy any better position than Rothwell, since they permitted him to take the conveyance to himself, without any mention of their rights in the purchase.

We come now to consider that portion of the decree which concerns Rothwell and the defendants. This must be supported, if at all, upon the two-fold operation of the principle that a purchase of an outstanding title or interest in property, by a person sustaining certain relations to others interested in the same property, should, at the option of the latter, enure to their benefit; the application being in this case made, first, to the purchase of the tax title by Dewees, agent for Paige, the assignee; and,

secondly, to the purchase made by Rothwell from the assignee, he being the husband of one of the tenants in common who held the property as heirs of Dewees.

So far as the tax title acquired by Dewees is concerned, there can be no doubt that the principle is correctly applied. As the agent of Paige, it was his duty to pay these taxes, and to prevent the sale of the lots. In violation of this duty he permitted the lots to be sold, and himself became the purchaser. Besides his general duty as agent, he had expressly covenanted, in writing, that he would, out of his own funds, advance the money and pay these taxes. There is nothing in law or morality plainer than that his purchase must be held to be in trust for the benefit of his principal, on repayment of the sum advanced by him. 1 Story Eq., sections 315, 1211, 1211*a*; Story on Agency, sections 210, 211; 8 Vesey R., 337. The defendants, who are his heirs, can stand in no better condition than he would if he were alive.

In regard to the application of the principle to the purchase of Rothwell from Smith, the successor of Paige in the assignment, it is claimed by defendants, that Rothwell is to be treated as having a common interest with them in the title derived from Dewees, and that his purchase of the outstanding equity of Reed's assignee, must enure to the common benefit of the cotenants of that title.

In the case of *Van Horne* vs. *Fonda*, (5 Johns. Chy. R., 407, the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase-money. The same point is also decided in *Farmer and Arnold* vs. *Samuels, et al.*, (4 Littell R., 187.) The soundness of the principle is not denied by counsel for plaintiff, as applicable to persons strictly tenants in common, or joint tenants, or others having an equality of interest or estate; but it is said that the complainant in this case is not tenant in common, but that his interest is at most only tenant by the courtesy of his wife's interest, and that even that is doubtful; and that there is no

equality of interest as between him and the defendants. In this connection much stress is laid by counsel upon the language of the Court in *Van Horne* vs. *Fonda*, to the effect, that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do any thing to the prejudice of the other, in reference to the property so situated. It seems to us that the true reason of the rule applies as forcibly to the husband of a tenant in common, as to one of the immediate co-tenants. This seems also to have been the opinion of the Court of Appeals of Kentucky in the case of *Lee and Graham* vs. *Fox*, (6 Dana's R., 176.) It was decided in that case that the husband of a co-heiress, who had purchased an outstanding incumbrance on the lands of the heirs should be held to have purchased for the benefit of all the tenants, upon condition only that they should contribute their respective proportion of the consideration actually paid for the incumbrance.

We are quite satisfied with this as a rule of equity, sustained as it is by authority and sound principles of morality, and as the decree of the Circuit Court was in conformity to it, it must be affirmed.

THE PEOPLE OF NEW YORK ON THE RELATION OF THE BANK OF COMMERCE *vs.* THE COMMISSIONERS OF TAXES FOR THE CITY AND COUNTY OF NEW YORK.

1. Stock of the United States is not subject to taxation under the laws of a State.
2. A State law for that purpose is unconstitutional, whether it imposes the tax on United States, stock *eo nomine*, or includes it in the aggregate of the tax payer's property, to be valued, like the rest, at its worth.
3. A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.
4. But the law of New York taxes the capital of banks according to its valuation, and the property which constitutes it is subject to taxation or entitled to exemption therefrom, like similar property held by individuals.
5. That portion of its capital which a New York bank has invested in the stocks, bonds, or other securities of the United States, is not liable to taxation by the State.
6. The taxing power, so far as it is reserved to the States, and used within constitutional limits, cannot be controlled or restrained by this Court, the prudence of its exercise not being a judicial question.
7. But a State tax on the loans of the Federal Government is a restriction upon the constitutional power of the United States to borrow money, and if the States had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

Error to the Court of Appeals for the State of New York.

The Bank of Commerce, a corporation in the City of New York, rendered its statement, according to law, to the Tax Commissioners, on which the latter were to fix the sum or valuation of property on which the taxation of the Bank was to be made. By this it appeared that their whole capital was nine millions one hundred and forty-eight thousand four hundred

and eighty dollars, ($9,148,480.00). Of this sum three hundred and ninety-two thousand two hundred and fourteen dollars and eighty-three cents (392,214.83) was invested in real estate, and the balance, eight millions seven hundred and fifty-six thousand two hundred and sixty-five dollars and seventeen cents, was all invested in stocks, bonds and securities of the United States, which the Bank claimed to be exempt from taxation. The Tax Commissioners reported the Bank as subject to assessment and taxation for the value of its stock, (deducting the value of its real estate and $20,000 undisputed exemption), at $8,736,265.00, without regard to its being invested in the public debt of the United States, but adding that this was not an assessment upon such public debt, but upon the bank capital.

Thereupon a *certiorari* was issued to them, according to a statute of New York, and these facts appeared in the Supreme Court, and the questions being debated, the Court was of opinion:

1. As to the public debt held by the Bank, issued to them prior to the Act of Congress of February 25, 1862, or contracted for by the Bank with the Government prior to that date although issued afterwards, the Bank was liable to taxation, and ordered the report of the Tax Commissioners to be confirmed to that extent.

2. As to the public debt issued after that date, (not contracted for before,) the Bank was not liable; and the Court ordered the report in this respect to be annulled and corrected.

The taxable amount of the capital was fixed at $7,341,265.00. according to these principles.

From the judgment the Bank appealed to the Court of Appeals, who, on hearing, affirmed the judgment of the Supreme Court, and a writ of error was thereupon brought to this Court.

Mr. Lord, of New York, for Plaintiff in Error.

The Commissioners of Taxation were bound to look into the components of the capital of the Bank, to ascertain its value and taxable condition.

And as the Bank was taxable not for its capital specifically,

but for its property, real and personal, the character of that property could not be overlooked by the Tax Commissioners.

And if the United States debt be, in fact, free of State taxation, it would be mere evasion to tax it in fact, under the general notion that it was taxed as property merely, and not as United States debt.

And the plaintiffs in error respectfully insist that the questions in this case are completely covered by the decision of this Court in *Wetson* vs. *The City of Charleston*, (2 Peters' Reports, 449).

But, subject to this claim as to the extent and effect of this prior decision, and treating the questions as open to discussion, in deference to the Court of Appeals of New York, the defendants in error submit that, on principle, the public debt of the United States held by the relators was not subject to taxation as was done.

The certificates, bonds, and public debt of the United States, issued under the power of Congress to borrow money, were means and instruments whereby Congress exercised that power under the Constitution. The money lent while yet held by the United States would clearly be free of State taxation in whatever form. This amount, therefore, is clearly out of the State power of taxation. The action of the Tax Commissioners is to bring this back under the State taxation by taxing the creditor's title to its repayment or return. And this title and right is distinctly a means whereby the United States procure the use of the money or property which they obtain.

Being a means adopted by Congress to carry out one of its sovereign powers, the State power of taxation does not extend to it. *Brown* vs. *State of Maryland*, (12 Wheat. R., 419); *McCulloch* vs. *State of Maryland*, (4 Wheat. R., 316, p. 425); *Osborn* vs. *Bank of United States*, (9 Wheat. R., 738, p. 859); *Dobbins* vs. *Erie County*, (16 Pet. R., 435).

If the State power extended to the means of carrying out the United States power, not only would a conflict of powers be possible; but, if the State power be admitted, that of the United States might be defeated.

It is not a case of concurrent powers, either of borrowing or of taxing. The power exercised by the United States is that of borrowing; there is no conflict with the State power of borrowing.

There is no conflict in the powers respectively of taxing; both the United States and the State may tax all articles of taxation to which their powers extend.

But the conflict is, that the State attempts to apply its power of taxing in restraint and diminution of the United States power of borrowing. Unless it shall be claimed that the State power of taxing may reach all property within its geographical limits, whether owned by the United States or others, so that there can be no property whatever within State limits out of its reach, such power must be deemed a limited one, and excluded from all application to the property of the United States. The State power of taxation is a sovereign power within the scope to which it extends, and within this limit it admits of no supervision or control. See *The People* vs. *City of Brooklyn*, (4 Coms. R., 422, based on 4 Pet. R., 514, p. 553, and 4 Wheat. R., 480). If, therefore, it embrace within its limits the means of carrying out the powers of the United States, it could tax them in any mode it might choose, partially or otherwise, specifically or otherwise. But it must be conceded that a partial or specific taxation would be *extra vires*, and it would then rest with the Courts of the United States to try the matter of the due and proper execution of a sovereign power of a State. This could not be done; for if the State power be a sovereign power, the sovereign body decides for itself both as to the occasion and mode of its exercise. Accordingly, it is the clearly established law of the Federal Constitution, in order to avoid all such conflicts, that the powers of the States are not held to apply to the subjects embraced in the execution of the powers of the United States. The power of borrowing money by the United States being a sovereign power, Congress alone is to determine the occasions on which it is to be executed, and also the modes and means of so doing. The only limit is to be looked for in the Constitution itself; and no such limit is violated in the present

case. Congress may make its securities under seal negotiable; no State law could prevent it. Congress could make its obligations valid without stamps; no State could impose a stamp act on them. Congress can make its obligations bear any rate of interest it might think fit; no State could render them invalid as usurious. In all these and numerous other illustrations, the State power of legislation itself is a sovereign power; and it is only restricted by reason of the subject being without its limits by its being the exercise of a power of the United States. As to the body having a sovereign power being the sole judge of the occasion of using it, see *Martin* vs. *Mott*, (12 Wheat. R., p. 29). The mode of exercising the power to borrow money by Congress or the occasion of its exercise, the necessity or propriety of the means, within the limits of the Constitution, are not open to inquiry in the Courts. Therefore, all the United States securities held or procured or contracted for either before or after the Act of February 25th, 1861, should have been left out of the valuation for assessment of taxes. By a sound exposition of the Tax Laws of New York, securities of the public debt of the United States were not subject to be included in the report of valuation for taxation. The Tax Statutes of New York, whereby real and personal property within the State are subjected to taxation, in terms embrace such property *owned by individuals or corporations;* now the United States were neither an individual nor a corporation within the terms of this law So that the real and personal property of the United States itself were not within the express terms of the act nor taxable under it. The statutes, however, proceed to say, that the liability of property to taxation shall be subject to certain exemptions. In sec. 4, the stating of the exempted property commences with "all property, real or personal, exempted from taxation under the Constitution of the United States," and this is followed by an express exemption "of all lands belonging to the United States." Now there was no other property exempted from taxation under the Constitution of the United States, than the means of carrying out its powers, and there were none of these then in existence or in contemplation, except the certifi-

cates of its public debt. This statute with its present general phrase of exemption, was adopted in 1829. This was the year when the case of *Weston* vs. *City of Charleston* was decided, after the severe and able opposition of Mr. Justice Thompson, the Associate Justice for the circuit in which New York was embraced. Cotemporaneous history thus leaves no doubt, that the exemption of property under the Constitution of the United States had special reference to the United States public debt, the taxation of which by South Carolina had been so decisively annulled. The Act of Congress of February 25th, 1862, sec. 2, providing "That all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority, was effectual to exempt all existing as well as future issues of public debt." See Acts of 1861, '62, p. 346. The act in its terms is clearly sufficient to embrace existing United States securities without any exception.

This clause was evidently produced by the decision of the Court of Appeals of New York in the case of the Bank of the Commonwealth, then just decided, and now under review in this Court. It is in exact affirmance of the decision in the case of *Weston* vs. *City of Charleston*. And Congress in it does not speak merely as contractors, but as legislators, in the assumption of its fullest powers as such.

It was a declaratory act in affirmance of a principle never denied since 1829, for more than thirty years. This act is not to be construed as the assertion of any general power to withdraw any kind whatever of property from State taxation at the election of Congress; but is to be construed according to the circumstances under which it was passed. Congress having reference to a means which had been employed in carrying out its power to borrow, and with the public knowledge that these securities had been held as not under State taxation, it was but protecting and asserting the supremacy of its power to pass this statute. If the issuing of this United States debt be within the scope of the power to borrow, and to determine the means of its exercise, it was a proper act of legislation The subject being

within one of the powers of Congress, they alone were judges of the fitness of its exercise and of its extent.

It was within the principle of the numerous Acts of Congress, withdrawing from State jurisdiction questions arising under the Laws of the United States, and titles taken and acts done under such laws. The act violates no provision of the Constitution of the United States; it does not interfere with any vested right. It is in affirmance of a right universally recognized prior to the decision of the Court of Appeals of New York, then just made.

The judgment of the Court of Appeals in the matter complained of should be reversed, and the proceedings remitted to that Court, there to be proceeded on according to the law as it shall be declared by this Court.

Mr. Develin and *Mr. Brady*, of New York, for Defendants in Error.

The surplus of stock which was taxed in the case now before the Court is supposed to be protected by an Act of Congress of February 25th, 1862, which provides that "*all stocks, bonds and other securities of the United States, held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under State authority.*"

The Act of 1862 introduces no new rule. It is a mere affirmation of what was decided in the cases of the *Bank of McCullough against the State of Maryland and others of a similar nature.* It exempts from specific taxation all stocks, &c., of the United States, but does not provide that no taxation shall be imposed by a State upon the surplus or capital of a bank, to the extent to which such surplus is represented by United States Stocks, &c., composing such capital. If this act could bear the latter construction, it would be unconstitutional and void as a direct attempt by the general government to interfere with the exclusive power of taxation by a State over corporations created by it, and property of individuals residing within the State, sharing the benefits and liability to the burdens of government. If such an exemption could be extended to the United States Stock

by an absolute Act of Congress, there is no reason why it might not also apply to any other property of the United States, though sold by the general government in the ordinary course of trade to a purchaser; and for such exercise of power there is no warrant or pretext under the Federal Constitution. The Federal Government has no powers except such as are delegated to it by the Constitution or necessarily implied in powers granted; in all other respects the States are sovereign. Federalist, Nos. 80 and 33; The Passenger Cases; *The Ohio Life Ins. and Trust Co.* vs. *De Bolt*, (16 How., 428.) The Constitution itself provides in its tenth amendment, that "Powers not delegated by the United States in the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." The general and State governments have respectively the power to levy taxes for their own appropriate uses without in any way interfering or having the right to interfere with the just powers of each other. (1 Story on the Constitution, Sec. 1034.)

There is nothing in the State Laws repugnant to the power of Congress to borrow money.

The exercise of this power involves three elements, a borrower, a lender, and an agreement as to the terms of the loan. The loan is a matter of contract and Congress may acquire the means of payment by the exercise of its power "to levy and collect taxes, duties, imposts, and excises,"—a power given for the express purpose of paying the debts and other charges of the Federal Government. The power of Congress to borrow money in terms is limited to borrowng "*on the credit of the United States*," and does not include the right to use the credit of, nor create a charge upon, nor restrict the means of self support of any State. The authority of Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution" to the Federal Govenment cannot effect this question. This is not an independent power to do something not otherwise provided for, but a delegation which includes all the necessary and proper means of carrying it into execution. (Story on the Constitution, Sec. 1237 and 1243.) It cannot be maintained

that in exercising the power to borrow money on the credit of the United States it is necessary to take away from a State a vital power to levy taxes for maintaining its authority and for the support of its government.

The general clause of the Constitution just referred to is in fact a *restriction* prohibiting extreme means, and limiting the government to those which are necessary and proper. The Act of 1862 is enacted *uno flatu*. It is incapable of division and must upon its terms and just construction stand or fall in all its provisions. It extends to all stocks, &c., though they might have been issued and acquired by individuals years before the passage of the law, and is equally retro-active and prospective in its operation. The State banks cannot claim an exemption under the law of 1862. The condition of their existence is that they shall bear a share of the public burdens. They were formerly taxed on the nominal amount of their capital stock, however it might be invested, or whatever might become of it, and now are taxable on the value of that stock. The Legislature might have required the banks to pay a specified sum annually for their privileges, though five times as much as their share of the public burdens, and clearly Congress would have no power to interfere. *Providence Bank* vs. ———, (4 Peters, pp. 561 and 562); *State Bank of Ohio* vs. *Knoop*, (16 Peters, p. 387.)

The judgment of the Supreme Court should be affirmed except as to the point that stocks issued after the passage of the Act of 1862 are exempt from taxation.

Mr. Justice NELSON. This is a writ of error to the Court of Appeals of the State of New York.

The question involved in this case is, whether or not the stock of the United States constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to State taxation. The capital of the bank is taxed under existing laws in that State upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation.

According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed the tax is upon the property constituting the capital.

This stock then is held by the bank the same as such stocks are held by individuals, and alike subject to taxation, or exemption by State authority. On the part of the bank it is claimed that the question was decided in the case of *Weston, et als.* vs. *The City Councils of Charleston*, (2 Peters, 449,) in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the State. The Court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it.

It has been argued, however, that the form or mode of levying the tax under the ordinance of the City of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine*, whereas in the present it is taxed in the aggregate of the tax payer's property, and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action.

It is true that the ordinance imposing the tax in the case of *Weston* vs. *The City of Charleston*, did discriminate between the stock of the United States and other property—that is, the ordinance did not purport to impose a tax upon all the property owned by the tax payers of the City, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*.

But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock of the United States from the other property of the tax payer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State it might be exercised to the destruction of the value of the stock, and consequently of the power or function of the Federal Government to issue it for any practical uses.

It will be seen, therefore, that the distincton claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached. The argument concedes that the Federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed. It is true that in many, if not in all of the Constitutions of the States, provisions will be found confining the power of the Legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint upon the power imposed by the State itself. In the absence of any such restriction discrimination in the tax would rest in the discretion of the Legislature. Whether regulated by the Constitution or by the Act of the Legislature is a question of State policy, to be determined by the people in convention or by the Legislature. In either case the power to discriminate or not is in the State. How then can this limitation upon the taxing power of a State, which the argument assumes may be used to discriminate against the Federal stocks be enforced? The power to enforce it must be independent of the State to be effectual. There can be but one answer to this question, and that is: by the supreme judicial tribunal of the Union. But is this Court a fit tribunal to sit in judgment upon the question whether the Legislature of a State has exercised its taxing power wisely or unwisely over objects

of taxation confessedly, as the argument assumes, within its discretion?

And is the question a judicial question? We think not. There is and must always be a considerable latitude of discretion in every wise Government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can any Court say that these are discriminations which, upon the argument that seeks to distinguish the present from the case of *Weston* vs. *The City of Charleston*, would or would not take it out of that case? A Court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised. We cannot, therefore, yield our assent to the soundness of the distinction taken by the counsel between this case and the one referred to.

Upon looking at the case of *Weston* vs. *The City of Charleston*, it will be seen that the decision of a majority of the Court was not at all placed upon the distinction we have been considering, but upon ground much broader and wholly independent of it.

The tax upon the stocks was regarded as a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States." The exercise of this power was interfered with to the extent of the tax imposed by the City authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The Chief Justice observes, that "if the right to impose a tax exists, it is a right which, in its nature acknowledges no limits It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe."

He then refers to the taxing power of the State, its importance, and extensive operation, and the delicacy and difficulty of fixing any limit to its exercise; and that in the performance of this duty, which had, in other cases, devolved on the Court it was

considered as a necessary consequence of the supremacy of the Federal Government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers of the States, and that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this Government may rightfully adopt.

He further observed, that "the sovereignty of a State extends to every thing which exists by its own authority or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the power of taxation on the means employed by the Government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give," and the Chief Justice then adds, "a contract made by the Government in the exercise of its powers to borrow money on the credit of the United States is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the Government was created."

It is apparent in studying this opinion in connection with the opinions of the Court in the cases of *McCullough* vs. *The State of Maryland*, (4 Wh., 116), and of *Osborne* vs. *The United States*, (9 Wh., 732), that it is but a corollary from the doctrines so ably expounded by the Chief Justice in the two previous cases in the interpretation of an analogous power in the Constitution.

The doctrine maintained in those cases is, that the powers granted by the people of the States to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this Government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this Government is sovereign and independent, and any interference by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the

Constitution and the Laws of the United States passed in pursuance thereof "the supreme law of the land."

The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the Chief Justice in the case of *Weston* vs. *The City of Charleston*, in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

An illustration of this principle in respect to the powers of the judicial department of this Government, is found in the case of the *United States* vs. *Peters*, (5 Cranch, 115). There the Legislature of the State of Pennsylvania attempted to annul the judgment of a Court of the United States, and destroy all rights acquired under it. It was quite apparent, if the exercise of that power could be admitted, the principle involved might annihilate the whole power of the Federal Judiciary within the State. The Act of the Legislature did not profess to exercise this power generally, but only in the particular case, on the ground that the Court had no jurisdiction. But the Chief Justice, in giving the opinion of the Court, very naturally observes, that the right to determine the jurisdiction of the Courts was not placed by the Constitution in the State Legislatures, but in the supreme judicial tribunal of the nation. If time allowed, many other cases might be referred to, illustrating the principle in respect to other departments of this Government.

The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in derogation of the powers granted to the General Government, within which, it is admitted, it is supreme. That Government whose powers

executive, legislative or judicial, whether it is a Government of enumerated powers like this one, or not, are subject to the control of another distinct Government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the Government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another Government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that Government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other Government, "it is a right which in its nature acknowledges no limits." And the principle is equally true in respect to every other power or function of a Government subject to the control of another.

In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, State and Federal. The Chief Justice, in *McCullough* vs. *the State of Maryland,* endeavored to fix this boundary upon the subject of taxation. He observed, "if we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union."

All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of Government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared.

Judgment of the Court below is reversed:*

THE BRIG AMY WARWICK.

THE SCHOONER CRENSHAW.

THE BARQUE HIAWATHA.

THE SCHOONER BRILLIANTE.

1 Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it.

2 One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right.

3 To justify the exercise of this right, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.

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* The case of *The Bank of the Commonwealth* vs. *The Commissioner of Taxes*, was also heard at this term. The record raised precisely the same questions as that in the *Bank of Commerce* vs. *New York City*, and the cases were decided in the same way for the same reasons. It was argued by Mr. Bradford of New York, for the Bank, and by Mr. Brady and Mr. Develin, of New York, *contra*.

4. To create this and other belligerent rights, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power: the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms.

5 A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.

6. A civil war exists, and may be prosecuted on the same footing as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be kept open.

7 The present civil war between the United States and the so-called Confederate States, has such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war; and they have, therefore, the right *jure bello* to institute a blockade of any ports in possession of the rebellious States.

8. The proclamation of blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure.

9. All persons residing within the territory occupied by the hostile party in this contest, are liable to be treated as enemies, though not foreigners.

10. It is a settled rule, that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.

11. The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture although she was prevented by accident from getting out sooner.

12 To make a capture lawful, it is not necessary that a warning of the blockade should have been previously endorsed on the register of the captured vessel.

These were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships of the United States. The libels were filed by

the proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal.

The *Amy Warwick* was a merchant vessel, and belonged to Richmond. Her registered owners were David and William Currie, Abraham Warwick and George W. Allen, who resided at that place. Previous to her capture she had made a voyage from New York to Richmond, and thence to Rio de Janeiro, Brazil. At the last named port she shipped a cargo of coffee 5,100 bags, to be delivered at New York, Philadelphia, Baltimore or Richmond, according to the orders which the master would receive at Hampton Roads. She was on her voyage from Rio to Hampton Roads and off Cape Henry when she was captured (July 10th, 1861) by the Quaker City. At the time of the capture the barque was sailing under American colors, and her commander was ignorant of the war. The Quaker City carried her into Boston, where she was libelled as enemy's property. The claimants of the vessel were the persons already named as owners. James Dunlap, Robert Edmonds, John L. Phipps, and Charles Brown claimed the cargo. The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States, averred that the master was ignorant of any blockade, embargo or other interdiction of commerce with the ports of Virginia, and asserted generally that the capture was unlawful.

The *Crenshaw* was captured by the United States Steamer *Star*, at the mouth of James River, on the 17th of May, 1861. She was bound for Liverpool with a cargo of tobacco from Richmond, and was owned by David and William Currie, who admitted the existence of an insurrection in Virginia against the Laws and Government of the United States, but averred that they were innocent of it. The claimants of the cargo made similar answers, and all the claimants asserted that they had no such notice of the blockade as rendered the vessel or cargo liable to seizure for leaving the port of Richmond at the time

when the voyage was commenced. She was condemned as prize on the ground that she had broken, or was attempting to break, the blockade at the time of her capture.

The *Hiawatha* was a British barque, and was on her voyage from Richmond to Liverpool with a cargo of tobacco. She left Richmond on the 17th of May, 1861, and was captured in Hampton Roads on the 20th by the Minnesota, and taken to New York. Her owners were Miller, Massman & Co., of Liverpool, who denied her liability to capture and condemnation on the ground that no sufficient notice had been given of the blockade. The claimants of the cargo put their right to restoration upon a similar basis.

The *Brilliante* was a Mexican schooner, owned by Rafael Preciat and Julian Gual, residents of Campeche. She had on board a cargo of flour, part of which was owned by the owners of the vessel, and part by the Señores Ybana & Donde, who were also Mexican citizens. She had a regular clearance at Campeche for New Orleans, and had made the voyage between those ports. At New Orleans she took in her cargo of flour, part to be delivered at Sisal and part at Campeche, and took a clearance for both those places. On her homeward voyage she anchored in Biloxi Bay, intending to communicate with some vessel of the blockading fleet and get a permit to go to sea, and while so at anchor she was taken by two boats sent off from the Massachusetts. She was carried into Key West, where the legal proceedings against her were prosecuted in the District Court of the United States for the District of Florida.

The minuter circumstances of each case, and the points of fact, as well as law, on which all the cases turned, in this Court and in the Court below, are set forth with such precision in the opinions of both Mr. Justice Grier and Mr. Justice Nelson, that more than the brief narrative above given does not seem to be necessary.

The case of the *Amy Warwick* was argued by *Mr. Dana*, of Massachusetts, for Libellants, and by *Mr. Bangs*, of Massachusetts, for Claimants.

The *Crenshaw*, by *Mr. Eames*, of Washington City, for Libellants, and by *Messrs: Lord, Edwards*, and *Donohue*, of New York, for Claimants.

The *Hiawatha*, by *Mr. Evarts* and *Mr. Sedgwick*, of New York, for Libellants, and by *Mr. Edwards*, of New York, for Claimants.

The *Brilliante*, by *Mr. Eames*, of Washington City, for Libellants, and by *Mr. Carlisle*, of Washington City, for Claimants.

One argument on each side is all that can be given. Those of Mr. Dana and Mr. Carlisle have been selected, not for any reason which implies that the Reporter has presumed to pronounce judgment upon their merits as compared with those of the other distinguished counsel, but because they came to his hands in a form which relieved him of the labor which the others would have cost to re-write and condense them.

Mr. Carlisle. The Brilliante is a regularly registered Mexican ship. Her principal owner, although a Mexican citizen by birth, had been naturalized in the United States. He was, before and at the time of the seizure, the United States Consul at the port of Campeche, a port on the coast of Mexico. The vessel was seized by the United States ship Massachusetts, in Biloxi Bay, north of Ship Island, between *Pas Crétien* and Pascagoula Bay, on the 23d of June, 1861.

She had sailed from New Orleans, with a cargo of six hundred barrels of flour, put on board there about the 16th of that month, four hundred barrels for the house of the claimant, (American Consul at Campeche,) and the residue for the Mexican house of Ybana & Donde, at Sisal, also a port on the coast of Mexico; to which houses it was respectively consigned, they being owners of the same, in these proportions.

I. There was no actual breach. The question is of intent.

At the time of the seizure, the Brilliante was lying at anchor in Biloxi Bay, and had so lain at anchor twenty-four hours or more. "She came out from New Orleans and anchored in

Biloxi Bay, so as to be able to communicate with one of the blockading vessels, but did not see any vessel of war. On the next day, on which the vessel was seized, the sea was too rough to go on board the Massachusetts, which was lying in sight."

Mr. Preciat, the claimant, "wished to go on board one of the blockading vessels, to see if he could get a permit to go out to sea; otherwise he intended to have returned with the vessel to New Orleans." (Deposition of the said Preciat, taken *in preparatorio*, Record, p. 11.) He was returning to Campeche, "to attend to the duties of his office (*U. S. Consul*,) and business generally." On going to New Orleans, he had a letter from the Commander of the Brooklyn, one of the blockading squadron, to the Commander of the Niagara, another of them. forwarding him to Mobile, where his son was at school, and whom he desired to take home. The passengers and crew mutinied, and refused to go to Mobile. The mate, taking control, steered for New Orleans, where the vessel arrived, and the crew were discharged. These facts appear from the declarations *in preparatorio*. The libel and decree are exclusively founded on the alleged attempt to leave New Orleans. The claimant had a right to expect that his application to return, although sailing from New Orleans would have been granted; or, if not granted, that he would have been allowed the option of going back to New Orleans; which he declares, on his examination, was his intention, if not permitted to return to Campeche. He swears that he had no intention to violate the blockade. There is nothing to contradict him, but everything corroborates his declaration. He was at anchor twenty-four hours, and a considerable portion of that time in sight of one of the blockading vessels, which the evidence shows he could not safely attempt to reach in consequence of the state of the weather. Before that period there is nothing to show that he might not have run the blockade safely; nor is there any reason suggested or supposable why he cast anchor, except that he had no intent to violate the blockade. His public character as United States Consul, and the facts before referred to, go in confirmation of this.

But chiefly, the terms of the President's proclamation insti

tuting this so-called blockade, are important to be considered upon this question of intent. The condition of things was unprecedented. From the nature and structure of our peculiar system of government, it *could have had* no precedent. The co-existence of Federal and State sovereignties, and the double allegiance of the people of the States, which no statesman or lawyer has doubted till now, and which this Court has repeatedly recognized as lying at the foundation of some of its most important decisions; the delegation of special and limited powers to the Federal Government, with the express reservation of all other powers "to the States and the people thereof" who created the Union and established the Constitution; the powers proposed to be granted and which were refused, and the general course of the debates on the constitution; all concurred in presenting this to the President as a case of the first impression. Assuming the power to close the ports of the seceded States, he evidently did so with doubt and hesitation. If the power be conceded to him, it cannot be denied that he might modify the strict law of blockade, and impose a qualified interruption of commerce. He might well have doubted whether, under the Constitution which he had sworn to support, a state of *war* could exist between a State, or States, and the Federal Union; whether, when it ceased to be insurrection, and became the formal and deliberate act of State sovereignty, his executive powers extended to such an exigency. Certainly, the words of the Acts of Congress authorizing him to use the navy did not embrace such a case. It was not quite certain that it had assumed this imposing shape. The President, so late as his message of July, was confident that it had not. He believed that the State sovereignties had been usurped by discontented leaders and a factious and inconsiderable minority. With the information laid before him, he declared that these seceded States were full of people devoted to the Union. Well, therefore, might he hesitate to exercise, even if he supposed himself to possess, the power of declaring or "recognizing" a state of *war*. His powers in cases of insurrection or invasion were clear and undoubted. He had the army, the navy, and the militia of

the States (the United States having no militia except in the federal territories) confided to his command, *sub modo.*

But insurrection is not war; and invasion is not war. The Constitution expressly distinguishes them, and treats them as wholly different subjects. But this belongs to a subsequent question in the argument. It is now referred to as bearing upon the construction of the proclamation, and consequently upon the question of *intent* to break *a blockade.* It is true that the proclamation calls it a blockade. But the message speaks of it as proceedings "*in the nature of a blockade.*" And the proclamation itself, by its terms and provisions, substantially conforms to the latter description. It founds itself upon the existence of "*an insurrection.*" It pronounces the disturbance to be by "*a combination of persons.*" It proceeds upon the Acts of Congress provided for "*insurrections*" by "*combinations of persons.*" It declares that the executive measures are provisional and temporary only, "*until Congress shall have assembled and deliberated upon the said unlawful proceedings.*" It requires the seceded States to disperse, and return peaceably "to their respective place of abode in twenty days."

"These "combinations of persons," and these "unlawful proceedings," are not at all recognized as presenting a case for belligerent rights and obligations. Naturally and prudently, the President did not assume to proclaim a strict blockade, with the extreme rights which obtain between belligerents, and with the corresponding rights of neutrals. He first called out the *militia of the States,* as such. He then used the army and the navy, under the Act of 1807. But he knew that this was not war. It was the suppression of insurrection. Consequently, in this use of the navy, he did not contemplate capture *jure belli.* Long after the period involved in this case, he maintained to all the civilized world, (see Mr. Seward's diplomatic correspondence, 1861,) that to attribute anything of belligerent right to these "*combinations of persons*" and these "*unlawful proceedings,*" was an outrage and an offence to the United States. In effect, his position was that it was purely a *municipal* question; and,

of course there could be no blockade, in the international sense, and no capture *jure belli*.

Accordingly, the proclamation threatens not the regular proceedings of a prize Court, but "*such proceedings as may be deemed advisable.*" And these proceedings are to follow upon a seizure to be made in the precise and only case where a vessel shall have attempted to enter or leave a port, and shall have been "duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning; *and if the same vessel shall again* attempt to enter or to leave," &c., then these undescribed proceeding shall take place.

Under these circumstances, upon the question of intent, it is submitted that the case is with the claimant.

But II. The terms of the proclamation, assuming it to have intended a *blockade*, (*jure belli*,) excuse this vessel and cargo. The only authority necessary to be referred to here is the case of *Md. Ins. Co.* vs. *Woods*, (6 Cr., 49,) decided by this Court. It is to be argued from, *a fortiori*. The qualified blockade, by a belligerent, was recognized. Notoriety of blockade in fact, and perhaps actual knowledge, are admitted in that case. But because a special warning off was provided for in this notice of the blockade, restoration was decreed. This Court said there, that they could not perceive the reasons for this modification. Nevertheless, they held it imperative. Here, the reasons are apparent.

III. This seizure took place before Congress had convened to act in the premises. It was made during that period when the President, casting about among doubtful expedients, had used the navy, under the Acts of Congress for suppressing insurrection and repelling invasion, and had used this force "*in the nature* of a blockade." It is denied that during this period there was WAR, or that the rights and obligations of war, either under the municipal or international law, had arisen. Of consequence, blockade and the prize jurisdiction could not have existed. The question here is, how can the United States, under the Constitution, be involved in war? And, to admit for a moment a

modern question, who has the power to accept, recognize, or admit a state of *war*, so that such a *status* will affect the people of the States, and foreign nations and their subjects, with the consequences of war, municipally and internationally? How are treaties suspended or abrogated? When are citizens residing in the several States placed in the condition of alien enemies, or of persons (*nolens volens*) identified with the Territory of a public enemy, in a state of public war, whether foreign or civil?

And, again, if this was not *war*, in any legal sense, who has the power of closing a port of entry of the United States against the trade of a foreign nation, to whom all ports of entry are open by treaty? This vessel and her cargo were wholly Mexican. The Port of New Orleans was a port of entry, open to her, for ingress and egress, and for all lawful commerce. How was it closed? It is clear that it was not closed by legislation. Nor was the Treaty with Mexico, which might have been suspended or abrogated by Act of Congress, (being only the "supreme law of the land," in the same sense with such acts,) in any degree disturbed by the National Legislature.

Now, this decree of condemnation could only be founded upon one of two alternatives: *seizure* under the municipal law, or *capture* under the international law, for violation, or attempt at violation, of a blockade.

It is plain that there was no municipal law by which it could be justified. The President cannot make, alter, or suspend "the supreme law of the land;" and this condemnation rests solely upon his authority.

IV. Was it capture? Blockade is a belligerent right. There must be war, before there can be blockade in the international sense, giving jurisdiction in prize. There may be an interruption of commerce, "*in the nature of a blockade.*" But this is the exercise of the legislative power, and is purely municipal. The distinction is plainly shown in *Rose* vs. *Himely*, (4 Cr., 272). But this legislative power does not reside in the President. The Constitution, in its first section, lays the corner-stone of the edifice it was erecting, declaring that "*all* legislative powers herein *granted* shall be vested in a Congress of the United States

which shall consist," &c. Therefore, it only remains to inquire, was there *war?*

But it has been objected that this question is not open here to this foreign claimant. This is a mistake. It is a principle of the law of nations that "the *sovereign* power of the State has alone the authority to make war." Wheat. on Captures, 40; Wildman, vol. 2, chap. 1. And Vattel (Lib. III, cap. 1, sec. 4) says: "The *sovereign* power has alone the authority to make war. But as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited, according to the will of the nation, *we are to seek the power of making war in the particular Constitution of each State.*" And Bacon (Ab. Tit. Prerogative) says: "It is *inter jura summi imperii*, and in England is lodged in the King; though, as my Lord Hale says, it ever succeeds best when done by parliamentary advice."

The counsel for the United States, speaking for the President, take very bold and very alarming positions upon this question. One of them testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done. He is astounded that he should be required to "ask permission of your Honors for the whole political power of the Government to exercise the ordinary right of self-defence." He pictures to himself how the world will be appalled when it finds that "*one of our Courts*" has decided that "the war is at an end." He tells us that this is merely a Prize Court, and that the Prize Court sits "by commission of the sovereign," merely as "an inquest to ascertain whether the capture has been made according to the will and intent of the sovereign." That, all the world over, the Courts merely *construe* the acts of the political power. That *war* is only "a state of things." It is the conflict of opposing forces, with guns and swords and bayonets, in large numbers; and the Executive power being actually engaged in such conflict, war exists conclusively for this "one of our Courts," sitting by "commission of the sovereign."

Another of the learned counsel tells us that "the sovereign

has assumed the responsibility. *His* Prize Court has no commission to thwart his purpose, or overrule his construction of the law of nations." And he added a significant admonition—that if "the pure and simple function of the Prize Court be transcended, then the Court is no longer a Court of the sovereign, but an ally of the enemy."

What place is this, where such thoughts are uttered? If the question were asked literally, and the dull walls of this old Senate Hall could comprehend and answer, they would give back in echoes the voices of departed patriots and statesmen—"this place is sacred to the Constitution of the United States."

But what tribunal is this? Is it "one of our Courts?" Does it sit "by commission of the sovereign?" Who is its sovereign? and what is its commission? It acknowledges the same sovereign, and none other, that is sovereign of the President and of Congress—the "respective States," and "the people" thereof It has the same commission, and none other, which gives authority to the President and to Congress—the Constitution. It arose at the creation of this Government, coeval and co-ordinate with the Executive and Legislature, independent of either or both. More, it was charged with the sublime trust and duty of sitting in judgment upon their acts, for the protection of the rights of individuals and of States, whenever "a case" should come before it, as this has come, challenging the Constitutional authority of such acts.

This is a Government created, defined, and limited by a *written* Constitution, every article, clause, and expression in which was pondered and criticised, as probably no document in the affairs of men was ever before tested, refined, and ascertained. It is the office of this Court, as an organic element of the Government, to construe this *Magna Charta*, and to bring all cases which come before it to this test. So that, as well by the peculiar quality of this Court, as by the clear doctrine of the law of nations, the question is here to be put and answered, *was there war?* Not, was there "*a state of things*" involving in point of fact all the deadly machinery, and all "the pomp and circumstance" of war; but, had "the sovereign power of the State

declared war; declared that it should exist, or that, by the act of an enemy, it *did already* exist; war with its legal incidents municipal and international?

In this first great experiment of a written Constitution, of course it was explicitly and exclusively declared, in words as plain as language affords, where this tremendous power should reside. *To Congress* is entrusted the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Art. I., sec. 8, par. 11.

It is not pretended that at the time of this so-called capture, Congress had declared that there should be war, or that war existed, or had in any manner dealt with the question of war. The "state of things" which the counsel for the Government call "war," had arisen in vacation. But the Constitution had expressly provided for this case, and plainly distinguished it from "war." This necessity for national defence or offence, by military force, might arise by "*insurrection or invasion.*" The former is domestic, the latter foreign violence. But even in this latter case, namely, an invasion by a foreign nation, in itself an act of war by that nation, the Constitution did not depart from its inexorable rule that the country could only be involved in the legal consequences of war by Act of Congress. It contemplated temporary measures by the Executive. It authorized Congress "*to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and* REPEL INVASIONS." Art. I., sec. 8, par. 15. So that, side by side, the two cases are distinctly provided for; the power to suppress insurrections and repel invasions, which Congress might delegate to the President by a general law (as it did); and the power to put the country in the state of war, which was limited to Congress alone, acting upon the particular case.

But it has been maintained that the Acts of Congress passed subsequently to these seizures, have by retroaction recognized and validated a previous state of war. This is utterly inconsistent with the idea of a Government created by written Constitution. To affirm that when a careful and scrupulous distribution of powers has been made between the three great depart

ments of free Government, either one may exercise the powers of the other, and that a subsequent cession or approval by the competent power will validate the act, is to convert the Constitution into a mere shadow. The maxim between private principal and agent, "*omnis ratihibitio*," &c., cannot apply. The supposed "*ratihibitio*" is not by the principal who speaks in the Constitution, but by another agent of the principal having no right to delegate the special power. The matter then comes back necessarily to the pure question of the power of the President under the Constitution. And this is, perhaps, the most extraordinary part of the argument for the United States. It is founded upon a figure of speech, which is repugnant to the genius of republican institutions, and, above all, to our written Constitution. It makes the President, in some sort, the impersonation of the country, and invokes for him the power and right to use all the force he can command, to "*save the life of the nation.*" The principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional Government be at an end, whenever he should think that "the life of the nation" is in danger. To suppose that this Court would desire argument against such a notion, would be offensive.

It comes to the plea of necessity. The Constitution knows no such word. When it pronounced its purpose "to form a perfect Union, establish justice, secure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," it declared that to these ends the people did "*ordain and establish this Constitution.*" In this form, and by these means, and by this distribution of powers, and not otherwise, did they provide for these ends; and they excluded all others. Any other means and powers are not Constitutional, but revolutionary.

The whole matter comes, then, to a few propositions. To justify this condemnation, there must have been *war* at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight

between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law—war carrying with it the mutual recognition of the opponents as *belligerents*; giving rise to the right of blockade of *the enemy's* ports, and affecting all other nations with the character of neutrals, until they shall have mixed themselves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact.

But the Constitution, providing specially not only for armed opposition to the law, and for insurrection, (embracing its largest proportions,) but also for *invasion by a foreign enemy*, treats as totally distinct the question of *war*. It contemplates all these contingencies. For the execution of the law, for insurrection, and for *invasion*, (an act of war,) Congress provided by the Acts of 1792, 1795, and 1807.

For the case of *war*, that is, to put the country in a state of war, with the municipal and international incidents of war, Congress did not provide; because the Constitution confided that case to Congress, as exclusively and without power of delegation, as it granted the judicial power to this Court and such inferior tribunals as Congress might create. Congress had not declared war to begin, or to exist already, at the date in question. Therefore, war did not exist; blockade did not exist; and there could be no capture for breach of blockade, or intent to break it.

The power of the Executive in respect of insurrection and invasion is derived from the Constitution, and cannot transcend the limits and provisions imposed by that instrument. The President is Commander-in-Chief of the Army and Navy. He may use these forces in case of opposition to the laws, insurrection, or invasion, as Congress has provided. But when he has thus used the whole force of the nation, he has only used a power which Congress is authorized to confer upon him in the special cases enumerated in the Constitution. *War* is reserved to the judgment of Congress itself, upon the actual case arisen.

The idea of retroaction, validating the usurpation of authority

is incompatible with the theory of this Government, founded upon a written Constitution distributing with exactness the powers which it confers.

Mr. Dana. The case of the Amy Warwick presents a single question, which may be stated thus: At the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?

There are certain propositions applicable to war with acknowledged foreign nations, which must first be established. An examination of the reasons on which those propositions rest will aid in determining whether the propositions are also applicable to internal wars. The general rule may be stated thus:

Property found on the high seas, subject to the ownership and control of persons who themselves reside in the territory of the enemy, and thus subject to the jurisdiction and control of the enemy, is liable to capture as prize of war. (Wheaton's Int. Law, 429, 400); (1 Kent's Comm. 56–60, 74–77); (3 Phillimore's Int. Law, § 85, 483, 484); Halleck's Int. Law, 470–2, 701); *The Amy Warwick*, (24 Law Rep., 335); *The Amy Warwick*, (24 Law Rep., 494); *Venus*, (8 Cr. 280); *Sally*, (8 Cr. 384); *Frances*, (8 Cr. 363); *Bella Guidita*, (1 Rob. 207); *Gerasimo*, (11 Moore Pr. C. 86; *Aina*, (38 Eng. Law & Eq. R. 600); *Abo*, (29 Eng. Law & Eq. R. 594); *Industrie*, (33 Eng. Law & Eq. R. 572); *Ida*, (Spinke's R. 33); *Baltic*, (11 Moore's Pr. C. 111); *Brown* vs. *United States*, 8 Cranch, 110); *The Hallis Jackson*, (Betts, J.); *The N. Carolina*, (Betts, J.); *Pioneer*, (Betts, J.); *Crenshaw*, (Betts, J.); *Gen. Green*, (Betts, J.); *Chester*, (2 Dall. 41); *Thirty hhds. sugar*, (9 Cr. 191); *Betsey*, (2 Cr. 64); *Mailey* vs. *Shattuck* (3 Cr. 488); *Livingstone* vs. *M. I. Co.*, (7 Cr. 506); *Escott*, (1 Rob. 203, n.); *Lady Jane*, (Rob., 202); *Hoop*, (1 Rob., 198); *Indian Chief*, (3 Rob., 12); *Danous*, (4 Rob., 255 n.); *Anna Catherina*, (4 Rob., 107); *President*, (5 Rob., 277); *The Meaco*, (Grier, J.); *The Marathon*, (Grier, J.); *The Amelia*, (Grier, J.); *Edw. Barnard*, (Betts, J.); *S. Independence*, (Sprague J.); *Victoria*

(Sprague, J.); *Charlotte*, (Sprague, J.); *Gen. Parkhill*, (Cadwalader, J.)

The above cases will be found to sustain the following propositions which I suppose will not be controverted, as applicable to cases of war with a recognized foreign power, and therefore are not elaborated.

First, It is immaterial in such case, whether the owner of the property has or has not taken part in the war, or given aid or comfort to the enemy, under whose power he resides.

Second. It is immaterial whether he be or be not, by birth or naturalization, a citizen or subject of the enemy; and if he be, whether he be loyal to his sovereign, or in sympathy with and actually aiding the capturing power.

Third. He may be a subject of a neutral sovereign. He may even be a special and privileged resident, as consul of a neutral power. Still, if property subject to his ownership and control, while he so resides, is found at sea, engaged in commerce, though it be lawful commerce with neutrals, it comes under the rule. Its capture is one of the justifiable modes of coercing the enemy with whom he resides.

Fourth. The owner may even be a citizen of the country making the capture; and there may be no evidence that he is disloyal to his own country, or that his residence with the enemy is not accidental or forcible. These are immaterial inquiries. The loss to him is immaterial, in the judicial point of view. The recognized right to coerce the enemy power affects the property, as it was situated when captured. The Court can look no farther. It is a political question whether the exercise of the right shall be insisted on.

Fifth. It is not necessary to show that the property in the particular case, if not captured, or if restored, would in fact have benefitted the enemy, and that its capture would tend to the injury of the enemy. The laws of war go by general rules. Property *in a certain predicament* is condemned, the general rule being founded on the experience and concession that property so situated is or may be useful to the enemy in the war, and that

the rights of neutrals and the dictates of humanity do not forbid its capture.

Sixth. It is not necessary that the property shall be at the time on a voyage to or from the enemy's country. The reason for the rule ordinarily seems stronger where the voyage is directly to the enemy's country, so that but for the capture it would have been actually subject to his control. But the rule is the same, wherever the vessel is bound. We have a right to prevent commerce and its gains on the part of persons residing in the territory of the enemy. And if the owner is friendly to the power under which he lives, the proceeds, subject to order in a foreign port, may be especially useful to that power.

I will now proceed to an examination of the reasons on which the preceding propositions rest, and afterwards consider whether those reasons are not equally applicable to an internal war.

WAR is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion. The means and modes of doing this are called belligerent powers. The customs and opinions of modern civilization have recognized certain modes of coercing the power you are acting against as justifiable. Injury to private persons or their property is avoided as far as it reasonably can be. Wherever private property is taken or destroyed, it is because it is of such a character, or so situated, as to make its capture a justifiable means of coercing the power with which you are at war. For war is not upon the theory of punishing individuals for offences, on the contrary (except for violations of rules of war), it ignores jurisdiction, penalties and crimes, and is only a system of coercion of the power you are acting against.

If, then, the hostile power has title or direct interest in the property, as if it is public property, it is, of course, liable to capture.

If the property is of a character ordinarily used in war, and in the possession of that power, or on its way to his possession, it is liable to capture. In such case it is immaterial in whom is the title.

The hostile power has an interest in the private property of

all persons living within its limits or control; for such property is a subject of taxation, contribution, confiscation and use, with or without compensation. But the humanity of modern times has abstained from the taking of private property not liable to use in war, when on land. Some of the reasons for this, are, the infinite varieties of its character, the difficulty of discriminating among these varieties, the need of much of it to support the life of non-combatant persons and animals, and, above all, the moral dangers attending searches and captures in households. But on the high seas, these reasons do not apply. Strictly personal effects are not taken. Merchandise sent to sea, is sent voluntarily, embarked by merchants on an enterprise of profit taking the risks, is in the custody of men trained and paid for the business, and its value is usually capable of compensation in money. The sea is *res omnium*. It is the common field of war, as well as of commerce. The object of maritime commerce is the enriching of the owner by the transit over the common field; and it is the most usual object of revenue to the power under whose government the owner resides.

For these and other reasons, the rule of coercion by capture is applied to private property at sea. *If the power with which you are at war has such an interest in its transit, arrival or existence, as to make its capture one of the fair modes of coercion, you may take it. The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power, is that the owner is residing under his jurisdiction and control.*

It is therefore evident, from this course of reasoning, that the capture in case *of enemy property does not rest at all on any actual or constructive criminality or hostility of the owner.* Suppose him to be a neutral, he has a right to reside with your enemy, and trade to and from thence, as against all your laws and the laws of war. If he is a loyal subject of your own, and is accidentally or forcibly detained in your enemy's country, and even is struggling to get away, his property is liable to capture, on this general principle. It is for the political power alone to say whether it will forego the condemnation The Courts must

adjudicate it to be a lawful prize. If he be a born and willing subject of your enemy, your right to capture is none the greater, nor is the legal reason for the capture different, though the reason may be more gratifying to the moral sense, and the capture more satisfactory. If the trader residing there is suspected of disaffection to that power, and of affection for you, his property is all the more likely to be subjected to contributions, if not actual confiscation by your enemy. He is not his own master, still less the master of his property. He and it are under your enemy's jurisdiction and control. You may capture it and refuse to restore it to the claimant, while he so resides and the war lasts, even if you compensate or remunerate him afterwards. But that is a political question. The Courts can only condemn it, if the political power asks for its condemnation.

Such being the rules applicable to external wars, and such the reasons on which the rules rest, we come to the question whether they are not equally applicable to internal wars?

But, first, the following general rule is established on authority.

In internal wars, it is competent for the sovereign to exercise belligerent powers generally. *Rose* vs. *Himely*, (4 Cranch, 272); *Cherriot* vs. *Foussett*, (3 Binney, 253); *Dobrie* vs. *Napier*, (3 Scott, 225); *Santissima Trinidad*, (7 Wheat., 306); *United States* vs. *Palmer*, (3 Wheat., 635); (Wheaton's International Law, p. 363, 5); (Grotius de Jure Belli, Prol. sec. 25); Burlamaqui, (N. & P. L., 263); 2 Rutherf. Inst., 503); (Hay & Marriot. 47, 23, 197, 216, 78, 94, 83): *Bynk, L. of W.*, (3 Hall's L. J., p. 11); *The Admiral*, (Grier, J., Law Int., Sep. 19, 1862); *The Marathon*, (Grier, J.); *The Meaco*, (Grier, J.); *The Amelia*, (Grier, J.); *Amy Warwick*, (24 Law Rep., 335, 494); *Gen. Parkhill*, (Cadwalader, J.); *Tropic Wind*, (Dunlop, J.); *Hiawatha, Hallis Jackson, Crenshaw, N. Carolina, etc.*, (Betts, J.)

None of the above cited cases make any distinction among belligerent powers, but treat them all as equally open to the sovereign in case of internal war.

The reasons on which the rules respecting belligerent powers rest, are applicable to internal wars as well as to external wars.

(1.) The object of the sovereign is to coerce the power which is organized against him, and making war upon him.

(2.) This power exercises jurisdiction and control *de facto*, and claims it *de jure* over the territory. It compels obedience, and exacts allegiance from all inhabitants of the territory, without respect to their wishes. It compels each inhabitant to pay taxes and imposts upon his property, to aid in the war, and makes his property liable to contribution or confiscation. This power therefore has the same interest in the merchandise of an inhabitant of the territory at sea, for the purposes of the war, as if it were an acknowledged sovereign. And the parent state has the same interest in the capture of the property, for the purpose of coercing the rebel power.

(3.) The right of the sovereign to capture it *jure belli*, is *not derived from any actual or presumed disloyalty or criminality of the owner.* It is equally immaterial, as in a foreign war, whether the owner is a citizen, alien or friend. Whether in other respects he has taken part in the war, or on which side. Whether the rebel power considers him faithful to them, or suspects him, or has him in prison as a traitor. The test and the reason is *the predicament of the property.*

(4.) If the owner was hostile to the *de facto* government under which he lives, and they had actually declared the property in question to be confiscated, before its capture, it would not be doubted that it was subject to capture. But their laws and rules respecting allegiance, obedience, contribution, confiscation and taxation, govern and affect this property, *in fact* (although, the sovereign will not admit *de jure*), so long as it is out of the actual custody and control of the parent sovereign.

(5.) It does not follow from his residence that the owner of the property in civil wars, owes general allegiance to the sovereign. He may be an alien, or even a mercenary soldier, or a political agent of some power that has recognized the rebels as a nation.

(6.) Suppose a part of a sovereign's dominions are wrested from him in public war, and his enemy establishes a civil as well as military government over it, and claims it as his own,

and the local authorities and a majority of the inhabitants acquiesce in the new dynasty, and it is established *de facto*, can it be doubted that it is *competent* for the sovereign to capture property of its inhabitants, at sea, as a means of coercion of the power possessing it?

It is still a political question with the sovereign, whether he will capture such property, and if condemned, whether, after a peace, he will compensate the owner, on proof of merit.

I will now consider certain objections made to the application to internal wars of the doctrine of *enemy's property*.

(1.) It is objected that the exercise of this power is inconsisten with the claim to civil jurisdiction over the owner.

Not more so than in foreign war. There the property of a subject is liable to capture, if it is in a certain predicament, *e. g.* if it is the peculiar product of enemy territory, and exported thence, or if the owner resides (however unwillingly) in the enemy's territory and under his jurisdiction.

(2.) It is objected that so the property of a loyal citizen may be condemned.

Not more so, than in foreign war. The property in the given predicament may belong to a loyal friend and subject, or an indifferent neutral. It is a political question whether the right shall be exerted over all such property, on reasons of general policy, or whether exceptions shall be made in case the owner so resident is loyal to us, or sympathizes with us.

(It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war.

The objections really amount to this, that *war powers can never be exercised in civil wars, at any stage, except by the rebels.*

According to this theory, if the civil war is one in which each

party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them.)

(3.) It is contended that if the owner is a traitor, his property is exempt from confiscation by the Constitution. Art. 3, sec. 3 and the Act 1790, ch. 9, sec. 24.

But there is no allegation or evidence that the claimants of this property are traitors. The Government has never treated or proceeded against them as such. And if they be traitors, they cannot compel the Government to proceed against them by indictment as traitors, and bring them within the clause of the Constitution. It cannot be admitted that the clause of the Constitution would exempt their personal property from confiscation, by proof on their part, of the commission of treason by them, if they were not proceeded against as traitors.

(4.) If it is objected that a traitor cannot personally be treated as a belligerent, or as levying war, I answer that the Constitution not only contemplates that treason may take the form of war, but confines treason, under our laws, to acts of such character and magnitude as amount to "*levying war* against the United States," or aiding those who are so levying war. Constitution, art. 3, sec. 3.

Having then established the position that in internal wars the sovereign may exercise belligerent powers, and that captures on the high seas on the ground of enemy's property form no exception to the rule, and are equally open to him with other powers, we come to consider what must be the condition of territory on which the owner resides to make his property enemy's property within the meaning of the law of prizes.

First. What is the rule in the case of external wars?

It is not necessary that the residence should be within the regular dominions of the enemy, as they were when the war began, or as they shall have since been established by treaty or public law.

It is sufficient if the territory is in the permanent occupation

of the enemy, who has established himself there, not avowedly for temporary purposes, but to hold so long as war shall enable him to hold it. If the enemy has established a civil and military government over it, and claims and exacts allegiance from all inhabitants, levies taxes, &c., the case admits of no doubt. *Gerasimo*, (11 Moore Pr. C. 101, cases there cited); *U. States* vs. *Rice*, (4 Wheat. 246); *The Meteo*, (Grier, J.); *Amy Warwick*, (Sprague, J., 24 Law Rep., 335); *Thirty hhds. sugar*, (9 Cr. 191.)

The principles will be found fully discussed in the case of the *Gerasimo*, supra.

The reason of the rule is this: The property must either be condemned or restored to the claimant. If restored, it goes under his legal control. He is a resident of the enemy's country, and this property, so restored, would go into the control of the enemy and add to his resources. The object of maritime capture is to straiten and reduce the enemy's means and resources. *Ex. gr.* if this ship had been permitted to go to Richmond, she and her cargo would have paid duties to the rebel government. They could have taken the vessel for military purposes. They could have taken the cargo for military necessities, with or without compensation as they should see fit. If they regarded the owner as an enemy, they could take it as a prize of war, or by way of confiscation.

(The law of prize of war, which condemns property that even by misfortune of a friendly owner, is impressed with a hostile character, or is going, when captured, into enemy's control, or will so go if restored, must not be confounded with municipal forfeiture or confiscation, which is usually penal or punitive for some offence of the owner.)

These reasons show that they are equally applicable to internal wars. The test is whether *the residence of the owner is under the established de facto jurisdiction and control of the enemy.*

In the *Castine* case, (*U. S.* vs. *Rice*, supra) there can be no doubt that it was *competent* for our Government to capture a vessel bound into that port in that state of things, and belonging to a person residing there, without reference to whether he was

as to his general political allegiance, a citizen of the United States, or a neutral alien, or a British subject.

It is not necessary to draw a fine line as to what is to be deemed enemy's territory, for the purpose of deciding this case, —if the above principles are applicable to internal war. I suppose it will be conceded that the nature and character of the occupation of Richmond, Va., was more than sufficient to constitute it enemy's territory, within the meaning of the rule.

We are now brought to another branch of the question before the Court. Conceding that the Sovereign may exercise belligerent powers in internal wars, and that capture on the ground of enemy's property is among those powers, and that Richmond was enemy's territory—it is still contended that under our Constitution, the exercise of these powers was not made by the proper authorities, and in the proper state of things.

It is contended that the President cannot exercise war powers until Congress shall first have "declared war," or, at least, done some act recognizing that a case exists for the exercise of war powers, and of what war powers.

There is nothing in the distribution of powers under our Constitution which makes the exercise of this war power illegal, by reason of the authority under which this capture was made.

I. It is not necessary to the exercise of war powers by the President, in a case of foreign war, that there should be a preceding act of Congress declaring war.

The Constitution gives to Congress the power to "declare war."

But there are two parties to a war. War is *a state of things*, and not an act of legislative will. If a foreign power springs a war upon us by sea and land, during a recess of Congress, exercising all belligerent rights of capture, the question is, whether the President can repel war with war, and make prisoners and prizes by the army, navy and militia which he has called into service and employed to repel the invasion, in pursuance of general acts of Congress, before Congress can meet? or whether that would be illegal?

In the case of the Mexican war, there was only a subsequent

gcreonition of a state of war by Congress; yet all the prior acts of the President were lawful acts of war.

It is enough to state the proposition. If it be not so, there is no protection to the State.

The question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by a foreign enemy, the Legislature refusing to declare war. But it is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right *to initiate a war, as a voluntary act of sovereignty.* That is vested only in Congress.

II. In case of civil war, the President may, in the absence of any Act of Congress on the subject, meet the war by the exercise of belligerent maritime capture.

The same overwhelming reasons of necessity govern this position, as the preceding.

This position has been recognized by every Court into which the prize causes have been brought in this country, by Judge Dunlop, the District of Columbia; Judge Giles, in Maryland; Judge Marvin, in Florida; Judge Betts, in New York; Judge Sprague, in Massachusetts; Judge Cadwalader, in Pennsylvania.

There are general Acts of Congress clothing the President with power to use the army and navy to suppress insurrections. Act 1795, ch. 36, sec. 2; Act 1807, ch. 39.

And it must be admitted that the function of using the army and navy for that purpose is an Executive function. But it is contended that before they are used as belligerent powers, before captures can be made, on grounds of blockade and enemy property, Congress must pass upon the case, and determine whether the powers shall be exerted.

Now, if Congress must so adjudge in the first instance, why not throughout the war? Civil wars change their character, from day to day and place to place. Congress should be a council of war in perpetual session, to determine when, how long, and how far this or that belligerent right shall be exerted.

The function to use the army and navy being in the President, the mode of using them, within the rules of civilized war

fare, and subject to established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any Act of Congress controlling him.

III. There were no Acts of Congress at the time of this capture (July 10, 1861,) in any way controlling this discretion of the President.

IV. Since the capture, Congress has recognized the validity of these acts of the President.

The Act Aug. 6, 1861, ch. 63, sec. 3, legalizes, among other things, the proclamations, acts and orders of the President respecting the navy. This includes the blockades, and the orders respecting captures.

The Act March 25, 1862, ch. 50, regulating prize proceedings, in sec. 5, recognizes prize causes as "now pending" in the Courts.

The proclamations make the blockades belligerent acts, and not municipal surveillance. They are declared to be "in pursuance of the law of nations," and guaranteed to be made effective and actual, and provision is made for warning.

They had been always treated as blockades under the laws of war, by the Executive, by the Courts and by neutral powers, before the passage of this Act.

Act July 17, 1862, ch. 204, sec. 12, recognizes prize causes as *now pending*, and regulates them; and recognizes decrees of condemnation in pending cases.

The Resolution of July 17, 1862 (No. 65), regulates the custody of prize money now in the Registry of the Courts.

When these acts were passed, Congress knew that great numbers of captures had been made, solely on the ground of "enemy property;" that the President had, through the several U. S. Attorneys, asked for their condemnation; that they had been condemned, solely on that ground, in all the chief districts; that condemnation on that ground had been refused in none; and that the proceeds of prizes condemned as enemy property were in the Treasury awaiting distribution.

All the acts for the increase of the army and navy, and for raising volunteers, speak of this state of things as a "war."

It is contended that the Act of July, 1861, ch. 3, secs. 5 and 6, is an action by Congress on the subject, inconsistent with condemnation of this property.

To this, I reply:

I. The capture, in this case, was before the passage of the act. The statute does not retroact.

It is an established rule to interpret statutory law as taking effect from its passage, not as varying the law or its administration by retroactive operations. *Matthews* vs. *Zane*, (7 Wheat., 211); 1 Kent's Com., 455, notes.

The statute does not in its terms contemplate a retroactive effect, but rather the reverse. Congress at the time of passing it knew that the President had exercised, as of right, full belligerent power to capture at sea on all the recognized grounds of war,—contraband, breach of blockade, and enemy property; and that the Courts were entertaining prize jurisdiction on those grounds.

Under such circumstances, if Congress intended to make void all those acts, it should be expressed in terms, unless it were necessarily and unavoidably the result of the statute, construed with all the established presumptions against retroaction.

All the Courts of the United States which have acted on prize causes since the passage of the act, have construed it as not retroactive.

II. There is no inconsistency in Congress, declining to act on the exercise of war powers by the President in the past, and at the same time making new and special provisions, qualifying or altering the mode of exercising those powers after a future event.

III. To give it a retroactive effect, would render this statute inconsistent with the Act of August 6th, 1861, ch. 63, sec. 3.

IV. The Act of 13th of August, 1861, does not relate to belligerent captures and prizes. It provides for civil forfeitures and confiscations, in the exercise of civil jurisdiction.

(1.) The terms "captures" and "prize" are not used. The terms are "seizure," "forfeiture," and "confiscation." The former are terms of war, the latter, of civil proceedings. Park on Ins.

c. 4, p. 73; 2 Arnould on Ins. § 303; *Richardson* vs. *M. F. & M. I. Co.*, (6 Mass., 108); Constitution of United States, Art. 1, sec. 8; *Higginson* vs. *Pomeroy*, (11 Mass., 110); *Black* vs. *Marine I. Co.*, (11 Johns., 292); *Thompson* vs. *Reed*, (12 S. & R., 443); Halleck's Int. Law, ch. 12, § 14; Halleck's Int. Gov., c. 30; *Rhinelander* vs. *I. Co. of Pa.*, (4 Cr., 42, 44); *Carrington* vs. *Merch. I. Co.*, (8 Pet., 518, 519); *Bradstreet* vs. *Neptune I. Co.*, (3 Sumner, 605, 616); *Davison* vs. *Seal Skins*, (2 Paine, 324).

(2.) The Secretary of the Treasury has full powers of remission of the "forfeitures," as in revenue cases, under Act of 1797, ch. 13, vol. 1, p. 506. This he may do, by general regulations of the Treasury Department. This is unknown to prize or belligerent proceedings, and inapplicable to them.

(3.) Sec. 9 gives jurisdiction over the "forfeitures," to certain Courts, which would be unnecessary if these were cases of prize.

(4.) The prize laws give an interest to the captors. Under this statute, the title rests in the United States by "forfeiture."

(5.) Sec. 6 introduces a principle unknown to prize law, to wit: That the whole vessel is condemned, on the sole ground that the owner of a part resided in enemy's territory. Congress can hardly have intended that.

That such is the true construction of the section, appears from the debates at the time of its passage.

This construction has been put upon it by the Courts, and the Treasury has adopted it, and authorized a remission of the forfeiture of the shares owned by residents in loyal States, under certain circumstances.

The true construction of the act, I respectfully submit to be this:

It is not an act specially providing for the present rebellion or, in terms, alluding to it. It is a general act, applicable to all times, and to rebellions or civil wars, of every possible character. The President might or might not, at his option, apply it to the present rebellion by issuing or not his proclamation. The act is applicable, at the option of any President, to a rebellion which is carried on under State authority, and it is applicable to no other.

Property may often be so situated as to become the subject both of condemnation as prize of war, and forfeiture by civil law. In that case, the prize law has the precedence. The cases of the *Rapid*, *St. Lawrence*, *Alexander*, and *Joseph*, in (1 Galli son's Rep.)

In further proof that this statute was not intended to establish or regulate or modify or affect the law of prize, it is observable that it touches small portions of entire matters over which the President had been exercising the right of belligerent capture, and has exercised them still without objection by Congress.

Sec. 6 does not forfeit vessels of persons residing in the rebel States, if found in the ports of those States. A rebel man-of-war could not be forfeited under that act if found in their own ports, nor if found elsewhere, if the title was in a neutral or a citizen of a loyal State. (Nor could it be condemned under the Act of August 6th, 1861, unless the owner of the vessel knowingly allowed it to be used in the war.)

Sec. 7 forfeits no property unless passing between the designated States and the other States. If found in the rebel States, or passing between rebel States, it is not forfeited, even if it be contraband of war. (Nor would it be forfeited if found there, under the Act of August 6th, 1861, unless the owner had knowingly allowed it to be used in the war.) If found at sea, passing between two rebel States, or between a rebel State and a neutral port, it would escape. Under this statute, no property could be seized for breach of blockade, unless passing between a rebel and a loyal State; no vessel could be seized for breach of blockade unless it was not only passing between a rebel and a loyal State, but carrying cargo; and the fact that the property was contraband would not forfeit it or the vessel carrying it, if it was bound from a neutral port.

That the rebellion had come to a state requiring the exercise by us of the war powers of blockade and capture, has been passed upon by the political department of the Government,—by both the Executive and Legislative branches. That is conclusive on the Courts. President's proclamations of April 15, April 19, 1861, and April 27, May 3, 1861; Acts of Congress,

Aug. 6, 1861, ch. 63, sec. 8; March 25, 1862, ch. 50; and July 17. 1862, ch. 234, sec. 12.

Whether a particular place, which the owner of the vessel inhabits, is enemy's territory, is for the Court to decide. The *Gerasimo*, (11 Moore, Pr. C., 101).

If the political department of the Government has decided that question, that is, of course, conclusive on the Courts.

If it has not been passed upon by the political department, the Court must decide it as a question of fact.

In this case, the political department decided that Richmond was in enemy territory, on the 10th of July, 1861. Proclamation of April 27, 1861, and Aug. 16, 1861; Act of Congress of Aug. 6, 1861, ch. 63, sec. 3.

We are brought, then, to three propositions:—

I. The right to capture, on the high seas, the property of persons residing in the enemy's territory, may be exercised in internal war.

II. In the present war, that right has been exercised by an authority which this Court must deem competent.

III. Richmond, Virginia, was enemy's territory, within the meaning of the law of prize, *jure belli*, at the time of this capture.

Mr. Justice GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports

of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is goverend and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities

against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted

on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*" Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by

popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad*, (7 Wheaton, 337,) this Court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the

arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown* vs. *United States*, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *expost facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "*enemies' property?*"

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and com

merce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and Laws of the United States are still operative over persons in all the States for punishment as well as protection

This argument rests on the assumption of two propositions

each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "*unconstitutional!!!*" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights, (see 4 Cr., 272.) Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has

a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy." 3 Wash. C. C. R., 188.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig Amy Warwick.

This vessel was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co. and four thousand seven hundred bags by Dunlap Moncure & Co. The title of these parties as respectively claimed

was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property."

The claim of Phipps & Co. for their advance was allowed by the Court below. That part of the decree was not appealed from and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

II. The case of the Hiawatha.

The Court below in decreeing against the claimants proceeded upon the ground that the cargo was shipped after notice of the blockade.

The fact is clearly established, and if there were no qualifying circumstances, would well warrant the decree. But after a careful examination of the correspondence of the State and Navy Departments, found in the record, we are not satisfied that the British Minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just Government. But the record discloses another ground upon which the decree must be sustained. On the 19th of April the President issued a proclamation announcing his intention to blockade the ports of the several States therein named.

On the 27th of April he issued a further proclamation announcing his intention to blockade the ports of Virginia and North Carolina in addition to those of the States named in the previous one. On the 30th of April Commodore Pendergrast issued his proclamation announcing the blockade as established. These proclamations were communicated to the British Minister as soon as they were issued. On the 5th of May the British Consul at Richmond wrote to Lord Lyons that he had advised

those representing the owners of the Hiawatha that there would be no difficulty in her leaving in ballast. He added, "*but to this they will not consent.*" On the 8th of May Lord Lyons made an application to the Secretary of State relative to this vessel. The matter was referred to the Navy Department. On the same day the Secretary of the Navy replied: "Fifteen days have been specified as a limit for neutrals to leave the ports *after actual blockade has commenced*, with or without cargo, and there are yet five or six days for neutrals to leave: with proper diligence on the part of persons interested. *I see no reason for exemption to any.*" Here was a distinct warning that the vessel must leave within the time limited, *after the commencement of the blockade.* On the 10th of May she completed the discharge of her cargo.

On the next day she commenced lading for her outer voyage, and by working night and day, on the 15th of May she had taken in a full cargo of cotton and tobacco. On that day the British Consul gave her a certificate, wherein he referred to the proclamation of the 27th of April, "in which it was announced that a blockade would be enforced of the ports of Virginia," and added, that "the best information attainable" "pointed to the 2d of May as the day when an efficient blockade was supposed to have been established."

On the 16th of May she was ready for sea, but there was no steam-tug in port to tow her down the river. At six o'clock, P. M., on the 17th she was taken in tow by the steam-tug David Currie. The tug had not sufficient power and the Hiawatha came to anchor again. On the 18th, at six o'clock, A. M., she was taken in tow by the steam-tug William Allison and towed out to sea. On the 20th of May she was captured in Hampton Roads off Fortress Monroe, and taken with her cargo into the Southern District of New York for condemnation.

The energy with which the labor of lading her was pressed evinces the consciousness of those concerned of the peril of delay beyond the time limited by the proclamation for her departure. The time was fifteen days *from the establishment of the blockade.* The blockade was effectual on the 30th of April.

There is no controversy upon the subject. The fifteen days

expired on the 15th of May—the day she completed her lading. A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations.

The certificate of the Consul states, that according to his information the blockade commenced on the 2d of May. It is not easy to imagine how he could have arrived at this conclusion. The James river is a great commercial thoroughfare. It would seem that news of so important an event must have swept up its waters to Richmond, as news of interest spreads along the streets of a city. Such circumstances must have immediately become known to the parties as were sufficient to put them upon inquiry, and were therefore equivalent to full notice. But, conceding the 2d of May to be the day from which the computation is to be made, then, the fifteen days expired on the 17th of May. Her voyage down the river was not effectively begun until the 18th of May. This was after the expiration of the time allowed. In either view she became delinquent, and was guilty of a breach of the blockade. The proclamation allowed fifteen days—not fifteen days, *and until a steam-tug could be procured.* The difficulty of procuring a tug was one of the accidents which must have been foreseen and should have been provided for. Those concerned, notwithstanding the warnings they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure and must now bear the consequences. If she could overstay the time limited for a short period she could for a long one. Whatever the excess of time, the principle involved is the same.

It is insisted for the claimants that according to the President's proclamation on the 19th of April, the Hiawatha was not liable to capture, until "the commander of one of the blockading vessels" had "duly warned" her, endorsed "on her register the date and fact of such warning," and she had again attempted "to leave the blockaded port." To this proposition there are several answers:

1st. There is no such provision in the proclamation of the 27th of April touching *the ports of Virginia.*

It simply announces that a blockade of those ports would be established.

2d. The proclamation of Commodore Pendergrast limits the warning to those who should approach the line of the blockade in ignorance of its existence. This action of the naval commander has not been disavowed by his Government, and is conclusive in a Prize Court. The warning proposed by this proclamation is according to the law of nations, and it is all that the law requires.

3d. If the provision referred to in the Proclamation of the 19th of April be applicable to the ports of Virginia, it must be considered in the light of the surrounding circumstances.

It was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and when caught her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurb, is a "*felo de se.*"

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

III. The case of the Brilliante, No. 184, presents but little difficulty. This was a Mexican vessel, with a cargo belonging to Mexican citizens, seized on the 23d of June, 1861, in Biloxi Bay, in an attempt to escape from New Orleans by running the blockade, which had been established there by an efficient force on the 15th of May preceding. She was carried by the captors to Key West, where she was libelled in the District Court of the United States for the Southern District of Florida, and condemned with her cargo as prize of war.

From the deposition of Don Rafael Preciat, who was part owner of the vessel and partner in the ownership of the cargo

and also was on board from the time she left her home port at Campeche until her capture, the following facts may be gathered.

In approaching New Orleans with a cargo from Sisal, she found the United States ship-of-war Brooklyn blockading the mouth of the Mississippi River at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. The witness had a son at Spring Hill College, near Mobile, whom he desired to get away; and the Commander of the Brooklyn gave him a letter to the Commander of the Niagara, recommending that he should be permitted to land and get his son. On leaving the Brooklyn she started along the coast in the direction of the Niagara, but instead of seeking that vessel, she evaded her, and went to New Orleans by way of Lake Ponchartrain. At New Orleans she discharged her cargo and took in another, and in attempting to escape by the way she intended, was captured as already stated.

Some attempt has been made to excuse her entrance to New Orleans by showing that the crew refused to proceed towards Mobile; but this is immaterial, as her condemnation is not for her successful entrance, but for her unsuccessful attempt to escape.

It is also urged that she was entitled to warning at the time of her capture, by virtue of the provision in the President's proclamation establishing the blockade. But whatever may be the sound construction of that provision in reference to warning vessels in its application to vessels which had notice of the blockade, the question does not arise in this case; because, from the statement of the owner of the vessel himself, she was warned by the officer of the Brooklyn.

The fact that the vessel's register was not produced by either party to show a warning endorsed on it, can make no difference. It cannot be supposed that such endorsement on the ship's register is to be the only evidence of warning; for if this were admitted, the vessel would only have to destroy her register, and with it the only evidence in which she could be condemned, or she would only need to keep several registers and destroy the one having the endorsement.

We entertain no doubt that this vessel and cargo were justly

condemned as neutral property for running the blockade, of which she had been fairly warned, and which she had once successfully violated.

The judgment is therefore affirmed.

The case of the Crenshaw, No. 163, on the other hand presents the question of "enemies' property," pure and simple. This vessel was seized in Hampton Roads on the 17th of May, 1861, by the blockading force at that point under flag-officer Stringham, and was carried as a prize of war into New York. The vessel and the larger part of the cargo were, at the time of the capture, owned by citizens of the State of Virginia, residing in Richmond; and the vessel had on board, among her papers, a clearance signed on the 14th of May by R. H. Lortin, Collector of the Port of Richmond, of the Confederate States of America.

Upon the principles already settled, the vessel and such parts of her cargo as came within the description of enemies' property, were rightfully condemned. It is however claimed that ten tierces of tobacco strips shipped by Ludlam & Watson at Richmond, to be delivered to shipper's order at Liverpool, and thirty tierces of tobacco strips shipped by W. O. Clark at Richmond, to order of Messrs. Sam'l Irven or assigns, Liverpool, are not enemies' property, and should be restored to claimants.

The claim for the ten tierces, as interposed by Henry Ludlam in behalf of himself and others, and the statement of the claimant's petition, are sworn to by Gustave Henikin, who holds the bill of lading, which is endorsed—"deliver to Ludlam & Henikin, for Chas. Lear & Sons', Liverpool. Ludlam & Watson."

Mr. Henikin states that his partner, Henry Ludlam, was in Europe, that Watson, (the partner of Ludlam & Watson, resident in Richmond,) was out of the jurisdiction of the Court, and that his knowledge of the facts embraced in the petition is derived from his connections with it as partner of Ludlam, and from correspondence and business relations with the shippers. The extent of his knowledge thus set forth is not very satisfactory nor is the claim stated in a manner to relieve it of any embarrassment growing out of this fact. He sets forth substantially that Ludlam & Watson, the shippers, was a firm composed of

Henry Ludlam, a citizen and resident of Rhode Island, and G. F. Watson, a citizen and resident of Richmond, Va., doing business in Richmond; and that Henry Ludlam was also doing business in New York in partnership with Gustave Henikin, under the style of Ludlam & Henikin, and that Lear & Sons were a mercantile partnership, composed of British subjects, residing in Liverpool. Then, speaking in behalf of all these parties, the petitioner says, they are owners of the ten tierces of tobacco, and *bona fide* owners of the bill of lading for the same, and that said tobacco was from the time of the shipment on board of the Crenshaw in the Port of Richmond, and still is the property of the claimants.

It will be seen at once, that the statement does not profess to set out what are the distinct interests of each individual in this property, nor the separate interests of the three partnership firms thus claiming it. Nor is there any attempt to show how any person beside Ludlam & Watson of Richmond, who were the shippers, acquired any interest in it. It is a joint claim on the part of all the persons mentioned, all of whom are asserted to be *bona fide* holders of the bill of lading. It is perfectly consistent with all that was stated, that Ludlam & Watson were the real owners of the property. The bill of lading, which is to shipper's order or assigns, throws no light on the subject, and there is not a particle of other testimony in reference to the claim in the record. The Court decreed that the interest of Lear & Sons in the ten tierces of tobacco be restored to them and that they pay costs, unless they furnished further proof that the property was *bona fide* neutral. They failed to furnish better proof and appealed on account of the costs.

We are of the opinion that the decree does them no injustice, and in the doubtful circumstances in which this claim stands, on their own statement, should have had great hesitation in giving them the property if the captors had appealed.

In reference to the claim of Ludlam, we are not sufficiently advised of what it is by his pleading or by the proof, to set apart for him, if it were just. But we are of the opinion that the firm of Ludlam & Watson, doing business in Richmond, where

Watson, the active member of the firm, resided, must be ruled by his status in reference to the property of the firm under his control in the enemy country.

The property was, through his residence in that country, subjected to the power of the enemy, and comes within the category of "enemies' property."

There is more difficulty in reference to the claim of Irvin & Co. to the thirty tierces of tobacco strips.

It very clearly appears that Irvin & Co., claimants, purchased this tobacco before the war broke out, with their own means, which were then in Richmond, and that they are citizens and residents of New York.

It is claimed that the property should be condemned on the ground that the transaction constitutes an illegal traffic with the enemy. This certainly cannot be held to apply to the purchase of the tobacco, which was bought and paid for before hostilities commenced. If it is intended to apply the principle of illegal traffic to the attempt to withdraw the property from the enemy country, it would seem that the order of the Secretary of the Navy allowing fifteen days for all vessels to withdraw from the blockaded ports, with or without cargo, should be held to apply to the property of one of our own citizens, residing in New York, already bought and paid for, as well as to any neutral cargo. If this be correct, it would seem that the property of Irvin & Co. should be restored to them as that of Laurie, Son & Co. was.

The right of Scott & Clarke to commissions on profits really constituted no interest in the property, and presents no cogni zable feature in the case.

This property will therefore be restored to the claimants.

Mr. Justice NELSON, dissenting. The property in this case, vessel and cargo, was seized by a Government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The Hiawatha was a British vessel and the cargo belonged to British subjects. The vessel had entered the James River before the blockade, on

her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the meantime having been established, she was met by one of the ships and the boarding officer endorsed on her register, "ordered not to enter any port in Virginia, or south of it." This occurred some three miles above the place where the flag ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag ship, which was done, when she was taken in charge as prize.

On the 30th April, flag officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: "All vessels passing the capes of Virginia, coming from a distance and ignorant of the proclamation, (the proclamation of the President of the 27th of April that a blockade would be established,) will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination."

The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and the Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th, in which, after referring to the above notice of the flag officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be ladened within the time. This vessel, according to the advice of the Secretary would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was

delayed in her departure for want of a tug to tow her down the river.

We think it very clear upon all the evidence that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and upon the merits that the ship and cargo should have been restored.

Another ground of objection to this seizure is, that the vessel was entitled to a warning endorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals, not material in this branch of the case, provides as follows: the President has "deemed it advisable to set on foot a blockade of the ports within the States aforesaid, (the States referred to in the recitals,) in pursuance of the laws of the United States and of the law of nations, in such case made and provided." "If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable."

The proclamation of the President of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the Hiawatha.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated on its face, is founded on the "law of nations," and

hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals; for, in his message a few months later to Congress, (4th of July,) he observes: "a proclamation was issued for closing the ports of the insurrectionary districts" (not by blockade, but) "by proceedings *in the nature of a blockade.*"

This view of the proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the Government were not permitted to collect the revenue, that "in the performance of this domestic municipal duty the property and interests of foreigners became, to some extent, involved in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning."

The question is not a new one in this Court. The British Government had notified the United States of the blockade of certain ports in the West Indies, but "not to consider blockades as existing, unless in respect to particular ports which may be

actually invested, and, then, not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them."

The question arose upon this blockade in *Mar. In. Co. vs. Woods*, (6 Cranch, 29.)

Chief Justice Marshall, in delivering the opinion of the Court, observed, "The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off."

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable, also, that both the President and the Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the Government.

Another objection taken to the seizure of this vessel and cargo is, that there was no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects

neutral nations. Chancellor Kent observes, "Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprize neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things." "Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them." He further observes, "as war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, (*Brown* vs. *United States*, 8 Cranch, 110,) all treaties between the belligerent parties are annulled, The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures *jure belli*. War also effects a change in the

mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war: and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our Constitution this power is lodged in Congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this Government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution

of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the Government must be exercised before this changed condition of the Government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case than would seem to be required, on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations or from the adjudication of the courts, but, because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation—enemies' property captured—blockades set on foot and all the rights of war enforced in prize courts—by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general Government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won—that in the language of one of the learned counsel, "Whenever the situation of opposing hostilities has assumed the pro-

portions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended and war in fact and by necessity is the *status* of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States —civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the Government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled?

The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general that it was quelled only by

calling upon the military power of the State. The Constitution declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Another clause, "that the President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States;" and, again, "He shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger, and in case of insurrection in any State against the Government thereof, it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations; and by the Act 3 March, 1807, (2 U. S. Laws, 443,) it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home

or invasion from abroad. The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the President from necessity should be construed as vesting him with the war

power, or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the Government. The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting down the

insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the property "of open enemies." For the first time the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognised or declared the war at the beginning to be a civil war

which would draw after it all the rights of a belligerent, but in the case of the President no such power existed: the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the Government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not be collected and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas Mississippi and Florida.

This Act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection usually modifies its effects with a view as far as

practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence. hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the act. The Act of 31st July is also one of a kindred character. That appropriates $2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the Government and the people of the States described in that proclamation.

The cases of the *United States* vs. *Palmer*, (3 Wh., 610); *Divina Pastora*, and 4 Ibid, 52, and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that when the Government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the Courts are bound to consider as lawful all those acts which the new Government may direct against the enemy, and we

admit the President who conducts the foreign relations of the Government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own Government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the Courts to follow the decision of the political power of the Government.

The case of *Luther* vs. *Borden et al.*, (7 How., 45,) which arose out of the attempt of an assumed new government in the State to overthrow the old and established Government of Rhode Island by arms. The Legislature of the old Government had established martial law, and the Chief Justice in delivering the opinion of the Court observed, among other things, that "if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

Congress on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure*

belli, from the date referred to. An *ex post facto* law is defined, when, after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce authorized at the time by acts of Congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Element of Int. Law, pt. 4, ch. 1. sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any Constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and

that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 18th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD, concurred in the dissenting opinion of Mr. Justice Nelson.

APPLETON *vs.* BACON & NORTH.

Parties engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for their benefit, can lay no claim to improvements conceived by him after the expiration of such agreement.

This was an appeal from the Circuit Court for the District of Columbia.

On the 7th of December, 1858, the appellants, Appleton, filed their bill in the Circuit Court of the United States for the District of Columbia for an injunction to restrain the defendant, Bacon, from using, selling or trading with, or otherwise employing a certain patent right for a new and improved mode of folding paper invented by defendant, North, which had been issued by the Patent Office to the defendant, Bacon, on the 10th of August, 1858. And also from constructing or authorizing to be constructed any machine or machines, having or containing the said improvement, &c., as aforesaid patented to him, until the further order of the Court; that he be decreed to surrender and deliver up the said letters-patent to be cancelled, that they be declared void, and for general relief on the ground that the complainants were assignees of the invention, and the patent should have been issued to them, but the defendant Bacon, had fraudulently procured it to be issued to himself.

The defendant, North, admitted all the facts stated in the bill.

The defendant, Bacon, denied all fraud and set up title in himself by reason of certain contracts alleged to have been made by North, (the inventor,) with a Company called the American Book and Paper Folding Company, which he alleged had been assigned to him, and that North had recognized and was acting under the said assignments at the time he made the said improvements.

No replication was filled, but evidence was taken on both sides. North was examined as a witness by complainants, under an agreement saving exceptions to his competency, and his testimony was by the Court ruled to be inadmissible.

The Court held that when part of the improvements were made by North he was in the employment of Bacon, under some agreement, (*either express or implied,*) and that all improvements made by him while so employed should be the property of Bacon. As to those improvements, they decreed that they rightfully belonged to Bacon, and as to those discovered after he went out of Bacon's employment, they belonged to the complainants.

From this decree cross-appeals were taken by the respective parties to the Supreme Court.

Mr. Bradley and *Mr. McCalla*, of Washington City, for Appellants, Bacon and North.

Mr. Carlisle and *Mr. Webb*, of Washington City, *contra.*

Mr. Justice NELSON. This is an appeal from the Circuit Court of the United States for the District of Columbia.

The bill was filed by the plaintiffs against the defendant, Bacon, to compel him to surrender and cancel letters patent for a new and useful machine for folding paper, granted 10th of August, 1858. Both parties set up a claim to the invention as assignees of John North, the inventor. The assignments to the plaintiffs were made under the dates of 12th of August, 1858, and 7th July, 1859. The defendant claims under an agreement

made between North and the American Book and Paper Folding Company, dated 6th of February, 1854, and between the same Company and Newell and John North, 2d of May, 1854, and by a subsequent verbal agreement between the defendant and John North sometime in May, 1856.

According to the terms of the two written agreements between North and the American Company the former stipulated to engage in the service of the Company, and devote himself to the making of improvements in paper-folding machines for a compensation mentioned; and, further, that all improvements and inventions made or discovered should be the property of the Company; and that he would take all proper steps for the purpose of procuring patents for said improvements. It was further stipulated that this agreement may be terminated by North on giving three months' notice after having served one year, and the Company at any time on giving thirty days' notice.

This Company, having subsequently resolved to close their business, gave a written notice to North on the 30th of May 1857, that his services would be no longer required. And, about the same time, sold, at auction, among other things, their interest in the improvements made by North in paper-folding machines, including a patent issued 15th of April, 1856, to North and another issued to E. N. Smith, 27th of November, 1849, and reissued 7th of January, 1851, which interests and property were purchased by one Anson Hardy. And, on the 1st of July, 1856, said Hardy assigned all his interest in the property to Bacon the defendant.

The defendant, after his purchase of these machines, made a verbal arrangement with North to enter into his service and devote himself to making improvements in folding-machines upon the same terms and conditions as those under which he had been previously engaged with the Company. This arrangement continued till about the middle of July, 1857, when he left the service of the defendant and engaged in the manufacture of sewing machines. Now, it is claimed, by the defendant, that the inventions or improvements embraced in the paper-folding machine in question were the fruits of the labors of North while

engaged in his, the defendant's, service, and when he was entitled to the benefit of his discoveries, or, when he (North) was engaged in the service of the American Paper-folding Company who were entitled to the benefit of these discoveries and which passed to him, the defendant, by assignment. The right, as thus derived, constitutes the title of the defendant to the invention and patent in controversy.

It has already been stated, that, among the property which passed to the defendant from the American Company through Hardy, was the patent to North for a paper-folding machine issued 15th of April, 1856. The labors of North, while in the service of the defendant, were devoted to improvements upon this machine, and it is this machine as improved in July, 1857, when North left the service of the defendant, that it is claimed embodied the invention and improvements in question, and for which a patent was issued to the defendant 10th of August, 1858. The circumstances under which this patent was issued will be stated hereafter. For the present, our inquiry is, whether or not North made these discoveries while engaged in the service of the defendant, or in the service of the American Folding Company.

North, who was made a defendant and a party on the record, was called as a witness on the part of the plaintiffs, and very fully examined on both sides. No objection is taken to the competency of his testimony before the officer taking it, nor in the brief in this Court, and we must regard it, therefore, as admitted by consent. This witness, after giving a history of the machine, of its exhibition at the fair of the American Institute in the fall of 1856, and also at Appletons' bindery in Franklin street, in the city of New York, in February, 1857, and of some improvements made upon it at that place, states that about the first of June, 1857, he removed the machine to a shop in Middletown, Connecticut, and worked upon it there some six weeks endeavoring to improve it, but with no good results; gave up the effort and went into other business—making sewing machines. This was about the middle of July, 1857.

The difficulties in the working of the machine while at Apple-

tons', and at Middletown, were in the adjustment to correspond with the different signatures—the register, also, was imperfect—and a fulness in the sheet which wrinkled it.

This machine was afterwards removed to Colt's armory in Hartford, Connecticut; and we have the testimony of E. K. Root—a witness for the defendant, and mechanical engineer—who examined it there, and saw it in operation. He was asked—"Of the sheets you have seen folded on that machine what proportion were crimped or wrinkled, and to what amount?" Answer: "My impression is that about one-half were wrinkled more or less—pretty much all on one side of the machine—so much as to be objectionable." "To what extent, if at all, would you consider the amount of wrinkling you observed as affecting of itself the practical value of the machine?" Answer: "I should say it would prevent its use on all good book work."

This testimony is confirmed by two other witnesses, Gavet and Mathews.

The machine to which these witnesses refer and speak of embodied all the improvements ever made upon it by North. Indeed, it is admitted he made none after the middle of July, 1857, and it is quite clear from the evidence that it was an unsuccessful experiment as a practical folding machine, and abandoned by him as such.

In the spring of 1858, North, at the solicitation of Mathews, who had charge of the bindery department of the Appletons, turned his attention to the invention of a machine that would fold the size of duodecimo sheets, all the previous machines that had been constructed having been adapted only to the folding of octavo volumes. As five-sixths of the business of book-folding was of the small size the invention was regarded as a great desideratum. This is the machine afterwards produced by North, and for which he applied to the Patent Office for a patent. The necessary papers, model, and certificate of payment of the patent fee were forwarded to the office 27th of May, 1858. The machine will fold books of both octavo and twelvemo size with entire success.

The papers and model were filed in the Patent Office 10th

June, 1858, and the patent issued to S. T. Bacon, the defendant, instead of to John North, the inventor, on the 10th of August following, and this without any previous notice to him. How this happened in the Commissioner's office has not been explained. It was a very grave irregularity. The specification on file was in the name of North, the application in his name, and the patent fee paid by him. We have seen the defendant, to whom it was issued, had no right to it, legal or equitable. The officer must have been imposed upon by the use of the old machine of 1856, which we have seen was but an unsuccessful experiment, and abandoned. The plaintiffs, as assignees of North, have made out a clear right to the patent, and the decree of the Court below must be reversed and the cause remitted, with instructions to enter a decree for the plaintiffs, directing the defendant to surrender the patent to be cancelled.

DE KRAFFT *vs.* BARNEY.

1. In order to give this Court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must be money, or some right, the value of which can be calculated in money.
2. A claim to the guardianship of the person and property of children, not on account of any pecuniary value attached to the office, but upon other considerations, is not within the jurisdiction of this Court.
3. *Barry* vs. *Mercein*, (5 How. 103,) re-stated and re-affirmed.

Appeal from the Circuit Court of the United States for the District of Columbia.

The appellant, De Krafft, by two petitions filed in the Orphans' Court of the District of Columbia, on the 2d of October, 1860, and the 7th of September, 1861, alleged that by reason of a decree of divorce rendered by the District Court of Jasper County, Iowa, on the 18th day of September, 1860, divorcing from the appellee his wife, Mary De Krafft Barney, since de-

ceased and allotting the custody and control of their infant children to the latter, the appellee was not entitled to the guardianship of the persons and estates of said infant children; and that even if so entitled the appellee was an unfit person to have the custody of the children and their estates, and ought to be removed; and the petition prayed the appointment of some suitable guardian to take charge of the children and their estates. The answers of the appellee to these petitions, filed on the 3d of November, 1860, and the 11th of September, 1861, denied the validity of the alleged divorce because the appellee was not a party to the proceedings wherein the decree was alleged to have been rendered, and because said decree was obtained by fraud. The answers further denied the alleged unfitness of the appellee to act as guardian, and pleaded to the jurisdiction of the Court to remove a guardian by nature. Here the pleadings ended. Evidence was taken at great length. The Iowa record showed on its face that the appellee was a non-resident of Iowa, was not served with process and did not appear, either in person or by attorney. Evidence was also produced showing that he was beyond the United States during the prosecution of the suit and had no notice that it was pending.

On the 25th of January, 1862, the Judge of the Orphans' Court delivered his opinion in which he held that by the 4th Article of the Constitution of the United States, Sec. I., and the Acts of Congress passed in pursuance thereof, the decree of the District Court of Jasper County was final and conclusive. The Court then rendered a decree appointing Dr. Harvey Lindsley guardian of the children, and requiring him to give bond with sureties, to be approved by the Court, in the sum of $30,000, which bond was accordingly given. The appellee appealed from this decree to the Circuit Court. The Circuit Court, at October Term, 1862, reversed the decree of the Orphans' Court, and directed said Court to cite the appellee "for the purpose of entering into bond with good and sufficient security for the performance of his trust as natural guardian of the estate of his infant children," &c. From this order De Krafft, in open Court prayed an appeal to this Court.

The case was submitted by counsel upon briefs, on a motion to dismiss for want of jurisdiction.

Mr. Davidge and *Mr. Ingle*, of the District of Columbia, in support of the motion.

In order to give this Court jurisdiction to re-examine a judgment, order or decree of a Circuit Court, (1st,) the matter in dispute must be money, or something whose value in money can be calculated and ascertained; (2dly,) the plaintiff in error, or appellant, must be deprived of such matter in dispute by the judgment, order or decree sought to be reversed; and (3dly,) the judgment, order or decree must be final.

As to the first requisite: It must be admitted that the right of revision exists only when questions of property are involved. Such is the only standard known to the law. By the Constitution of the United States, the appellate jurisdiction of this Court exists only when it is conferred by acts of Congress. The language of those acts is plain and unambiguous; the matter in dispute must be of the value of $1,000. The test of jurisdiction is a money or property test.

Applying this test to the present case; What is the value of the matter in dispute? What is the controversy? It is a controversy as to the right of a father to the custody, comfort and society of his children. The pretensions of the appellant, as set out in his petitions filed in the Orphans' Court, are that the appellee was deprived of this right by the decree of the Iowa Court, or, if not so deprived of it, ought to be by the Orphans' Court. In either case the matter in dispute is the right of the father.

What is the value of that right? It is plain it cannot be computed in money—it is not the subject of pecuniary estimation. It is in no sense a money or property right; and hence it is not within the grant of appellate jurisdiction to this Court.

The subject is not new in this Court. In *Barry* vs. *Mercien*, (5 How., 103), the controversy was between the father and mother of an infant daughter, each claiming her custody. To

the judgment of the Circuit Court of New York, denying the writ of *habeas corpus* prayed for by the father against his wife, who had possession of the child, he sued out a writ of error. A motion was made to dismiss for the want of jurisdiction; and this Court held that it had appellate jurisdiction only when rights of property were concerned, and that the matter in dispute was utterly incapable of being reduced to a money standard; and hence dismissed the cause. And to the same effect are *Grant* vs. *McKee*, (1 Pet. 248); *Ritchie* vs. *Mauro*, (2 Pet. 248) *Scott* vs. *Lunt*, (6 Pet. 349); *Ross* vs. *Prentiss*, (8 How. 772), *United States, ex rel., Crawford* vs. *Addison*, (22 How. 174, 181); and numerous other cases.

But secondly: Even if the character of the subject matter in dispute in this cause were not conclusive against the jurisdiction of this Court, how is the appellant aggrieved or otherwise affected by the order of the Circuit Court? Of what right or claim, touching the matter in dispute, is he deprived? The order of the Circuit Court appealed from confides the custody of the children to the father, and gives him also the management of their property, on his giving adequate security. What is *taken from* the appellant by such order? He never had any claim, or pretence of claim, either to the children or to the management of their property. By the law of the District of Columbia, if there be no natural guardian, the selection of the guardian rests wholly in the discretion of the Orphans' Court. One man has no more right or title to the office than another. Nobody has any such right or title. It is again asked of what right or claim has the appellant been deprived by the order of the Circuit Court? As regards the persons and property of the children, does not the appellant, since the order, stand precisely as he did before? In the second petition he disclaims any desire to be appointed guardian.—He has not, therefore, even disappointment, much less the invasion of any legal right, to complain of. He may *prefer* that the father should not have the custody of the children and their property, and that the guardian appointed by the Orphans' Court should; but such preference furnishes no ground of jurisdiction.

If this appeal, therefore, be regarded as taken by De Krafft in his individual character, it is plain he has sustained no injury, as even the costs are directed by the Circuit Court to be paid out of the estate of the children; and the petitions are filed by him in his individual character, and the appeal so prayed. He nowhere appears as *prochein ami*. But assuming that he acted as such, and that the suit is, in legal contemplation, the suit of the children: the argument is the same. What injury, it is asked, has been sustained by them? They must have some guardian for their persons and property; and that guardian is legally entitled to his commissions. What have they lost by the establishment of the legal right of their father? What legal right or claim is there to which they were entitled unde Lindsley and are not now equally entitled to? It seems absurd to say that, as regards the children, there is anything more involved than the *choice* between two persons, for some guardian they must have; and assuming that they prefer Lindsley to their father, (which is not the fact,) such preference will no give jurisdiction to this Court.

Thirdly: The order is not a final order. It does not put an end to the whole controversy. Whilst it affirms the father's right to the custody of the persons of the children, it directs the Orphans' Court to cite him to give security for the management of the property. A portion of the controversy is therefore left undisposed of. If he fails to give security, a special guardian is to be appointed to take charge of the property. The suit in the Orphans' Court continues: that Court alone can *dismiss* the petitions. The suit goes on there, subject to the direction of the Circuit Court; but relief may be still granted under the petitions. They are, at all events, to be disposed of by the Orphans' Court. It is true that the judgment of the Orphans' Court has been reversed; but a reversal of judgment does not dispose of the matter in dispute. *Mayberry* vs. *Thompson*, (5 How. 121.)

Very similar to the present case was that of *Van Ness* vs. *Van Ness*, (6 How., 62.) There letters of administration on the estate of John P. Van Ness were claimed by a party alleging herself to be his widow. The next of kin denied that she was such, and

under the Act of Assembly of Maryland, (1798, c. 101,) the Orphans' Court directed an issue to be sent for trial to the Circuit Court. At the trial, numerous exceptions were taken. The finding of the jury was ordered by the Circuit Court to be certified to the Orphans' Court, and from this order the writ of error was sued out. Under the above act the finding and order were *conclusive;* and the Orphans' Court could not do otherwise than render judgment in conformity with them. This Court held that the order of the Circuit Court was not a final order, and dismissed the writ of error.

Mr. Coxe and *Mr. Blount*, of the District of Columbia, in opposition to the motion.

The appellee contends, that to give this Court jurisdiction the matter in dispute must be money, or something which admits of a pecuniary valuation.

The subject of controversy is then stated to be "the right of a father to the custody, comfort, and society of his children."

It is somewhat singular that in the order of the Circuit Court not a word is said of the guardianship of the persons of the children, or of their custody, comfort, or society.

Appellee is to be cited to give bond for the performance of his trust as natural guardian of the estate of the children, and upon his neglect or refusal then to appoint a fit and proper person to take care of and manage the estate and property of the infants.

It may be questioned whether the phraseology employed by the Orphans' Court is not more technically accurate than that used by the Circuit Court. The former, pursuing the precise language of the Maryland statute, appoints a guardian of the infant children, the word as clearly indicated by the whole scope of the statute, and especially by the proximate context including the guardianship of the person as well as property. The superior Court, while limiting the responsibility of the father's bond entirely to the estate of his children, and in case of his refusal to give the bond required the substitution of another guardian, equally limited in authority and responsibility, wholly

omits to provide for the maintenance, education, and especially that which it is now insisted constitutes the entire subject of controversy, "the custody, comfort, and society of the children." It may be surmised that the paramount consideration in the mind of the party or counsel who drafted the order, hastily and inconsiderately adopted by the Court, was not rather the estate of these minors than their physical, moral, intellectual or religious well-being.

Indeed, it may well be doubted whether the phrase *natural guardian of an estate* is not utterly unknown in the law. In the complicated system of the Enlish common law there were a variety of guardians—by nature, by nurture, in socage, chivalry, &c. The father was guardian by nature, but that guardianship extended only over the person, and did not continue until the infant attained his majority The abrogation of some of the feudal rights and prerogatives necessarily annulled some of these species of guardianship and by the Statute of 12 Car. II., c. 24, authorizing a father by will or deed to appoint a guardian, such guardian might be continued until the infant attained the age of twenty-one. Vide, Co. Litt. 106, a. s. 123; Hag, n., ad idem, 67, 68; 2 Fonbl. 240, 244.

If these views be correct, it necessarily results that the matter in controversy in this case is not, as the learned counsel contends, the simple "right of a father to the custody, comfort, and society of his children."

Even were this the real aspect and character of the case, it by no means follows that this Court is incompetent to exercise an appellate jurisdiction.

The language of the Act of April 2, 1816, which limits the right of appeal from the Circuit Court of this district to cases in which the matter in dispute is of the value of $1,000, has received a judicial construction in this Court. 8 Peters, 44, *Lee* vs. *Lee.* It was the case of a petition for freedom. On p. 48, the Court says: "The matter in dispute is the freedom of the petitioner. The judgment of the Court below is against their claims to freedom. The matter in dispute is, therefore, to the plaintiffs in error the value of their freedom, and that is not susceptible of

pecuniary valuation." The Court entertained no doubt of its jurisdiction.

If in this case on the part of the appellee the matter in controversy was the right of the father to the "custody, comfort, and society of his children," as is contended, it is at least equally apparent that on the other side the case involves, so far as a guardian can control, mismanage, or impair the estate of his wards, the misapplication and misappropriation of the income resulting from it, their maintenance and support, their domestic, family, and religious education and training, either by precept or example, considerations of infinitely weightier importance than any of a purely pecuniary character. If the value of freedom to one held as a slave, although not susceptible of valuation in money, constitutes a value which, as the Court says, in *Lee* vs. *Lee*, leaves no doubt as to the appellate jurisdiction of this Court, surely the physical well-being, the proper maintenance, moral, intellectual, and religious training of four infant children, two males and two females, most imperatively invoke the exercise of all the authority of this Court in their behalf and for their protection.

It is also attempted to be shown, that the appellant has no legal or equitable interest in the matter in controversy; that he has none of a personal kind, inasmuch as he declined the position of guardian; none in a representative character, as "he nowhere appears as *prochein ami*." In a pecuniary point of view, he has no interest, and he has presented none. But he is the only near male relative to the late Mary De Krafft, and on the mother's side of the children of the deceased. Moreover, it appears, both from the language of his petitions to the Orphans' Court as well as from the opinion of that Court, that he appeared as "*prochein ami*." It is manifest that not De Krafft, in his individual character, asserting any individual interest, is the appellant in this cause, but the four orphan children, as with an allowable departure from the precise meaning of the word orphan, they sometimes appear to be designated on this record, through his instrumentality, as their "*prochein ami* and relative," are the parties to this suit.

As regards them, the matter in controversy is the management and control over their property, the value of which is not less than 60,000 dollars—the providing them a proper maintenance, an education suitable to their circumstances and situation in life. The case as presented in the Orphans' Court, and now appearing on this record, involves the question whether this appellee, the father, is not alleged and proved to be from all his antecedents utterly unfit to assume such high responsibilities. The decree of the Orphans' Court has adjudged him to be wholly disqualified, and it appears from the opinions appended to the appellee's brief on this motion, that the order of reversal by the Circuit Court proceeded on the ground that the Orphans' Court had no jurisdiction in the case.

This, it is alleged, is not a final judgment. It is manifest that it is not an interlocutory judgment, order or decree. It is equally obvious that it is a most singular one on the facts presented on the record. A petition is presented by these minor children through their next friend, averring the unfitness of their father to perform the office of guardian, and asking the Court to appoint some suitable individual to that office. The Orphans' Court, after a laborious investigation, adjudge the allegations against the father to be substantiated by the testimony, and proceed in conformity with the prayer of the petition to appoint a gentleman of the most unexceptionable character to the position of guardian. The Circuit Court reverse this order, on the ground that the Orphans' Court under the laws of Maryland, now in force in this District, had no jurisdiction to entertain such an application, or to grant the prayer as desired.

One accustomed to the ancient and well established course of proceeding in analogous cases, would have supposed that the Orphans' Court being thus adjudged to have assumed a jurisdiction not conferred upon it by law, would simply have been directed to dismiss the petition. It would certainly have been a fair inference that if the petitioner was improperly before that Court, if he had no case on which that Court could rightfully act, if the petition asked that which the Court could not legally grant the only proper course would be to dismiss it.

Unfortunately for the case of the appellee, the most careful examination of the record discloses not the shadow of evidence showing that he ever did apply "to be permitted to give bond for the performance of his trusts as natural guardian of the estates of his infant children," or any other bond for any purpose whatever; nor does the final decree, or any other order or decree to be found in this record, convey the slightest idea that any such application had been made or rejected.

The order of the Court, as given in the record, is wholly silent as to both these points. Unless, however, this appellee did present his case in some form or other, and the decision of the Orphans' Court had, as the one version of the decree of the Circuit Court assumes, it is plain that no such directions as are contained in them, as to what the Orphans' Court should do, can be maintained as right. It may be incidentally noticed here that the power which the statute confers upon the Orphans' Court to require a bond from the father as natural guardian of his children, can only be exercised "on the application of any friend of the infant." See Act of 1798, c. 101, S. C. 12 sec. 8. No such application has been made by any one; the Court cannot, *ex mero motu*, cite the father to give such bond; the order of the Court is therefore warranted by no law.

It is argued in the brief that this decree or order is not final, because further proceedings are directed.

In a large proportion of the cases brought before this Court by writ of error or appeal, there are further proceedings in execution of the judgment of this Court. The order in this cause, however, effectually puts this appellant and the case out of Court. He can have, and the cause he represents can have, no longer a standing in Court. It is impossible to conceive of a decision against him more decidedly a final one.

It is unnecessary to show any actual abuse of his authority as natural guardian by Barney.

2 Story Eq. Jur., § 841, note 4. Guardianship, by nature is of the heir apparent (at common law). It belongs to the father or mother. It extends no farther than the custody of the infant's

person. Guardianship by nurture lasts only till fourteen, and extends only over the person.

Mr. Chief Justice TANEY. This case cannot be distinguished from the case of *Barry* vs. *Mercein*, (5 How., 103). The controversy in that case was between a husband and his divorced wife, respecting the guardianship of a child of the marriage who was still an infant.

They were living apart, and each of them claimed the right to the guardianship. And after full argument, the Court held that in order to give this Court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money. And as the matter in controversy between the parties was not money, nor a right which could be measured by money, but was a contest between the father and mother of the infant upon other considerations, the appeal was dismissed for want of jurisdiction.

In the case before the Court, it is admitted that De Krafft, the appellant, has no pecuniary interest in the controversy. He appears as *prochein ami* for the children of Barney, whose wife is dead, and from whom the children inherited a large property. De Krafft alleges that Barney, from his character and habits, is unfit to be trusted with the guardianship of the persons or property of his children, and prays that some other persons suitable and trustworthy may be appointed by the Orphans' Court. The guardianship of the persons and property of the children is, therefore, the only matter in dispute, not on account of any pecuniary value attached to the office, but upon other considerations. The case is the same in principle with that of *Barry* vs. *Mercein*, above referred to, and the appeal to this Court, for the same reason, must be dismissed for want of jurisdiction.

KOEHLER *vs.* THE BLACK RIVER FALLS IRON COMPANY.

1. An instrument purporting to be a mortgage, made by a corporation, is not a legal mortgage, and a bill to foreclose it as such cannot be sustained unless it be sealed with the corporate seal of the mortgagor.
2. The mere fact that such a mortgage-deed has the corporate seal attached to it, does not make it the act of the corporation if the seal was not affixed by a person duly authorized.
3. The presumption is, that the seal was rightfully affixed to a deed, or other instrument, on which it appears; but that presumption is not conclusive, and may be repelled by parol evidence.
4. Where it is proved that the officers who executed a mortgage did not seal it then nor afterwards; that the officer who had the seal in his custody never affixed it nor authorized another to do so, and that the mortgage was recorded without a seal, the burden is thrown on the mortgagee to prove that it was properly sealed, and if he fails the conclusion of law is, that the seal was wrongfully and fraudulently affixed.
5. A mortgagee whose bill seeks a foreclosure, on the sole ground that the mortgage is a legal one, cannot be decreed an equitable mortgagee, unless he files a new bill in which his equitable rights are set forth.
6. The officers and directors of a corporate body are trustees of the stockholders, and in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty.

Appeal from the District Court of the United States for the District of Wisconsin.

Mr. Carlisle of Washington City for appellant

Mr. Doolittle of Wisconsin. *Contra.*

Mr. Justice DAVIS. This was a bill in chancery, brought in the District Court of Wisconsin by Jacob Koehler, Daniel Koehler, and Harry Pfiffner against the "Black River Falls Iron Company," to foreclose a mortgage.

The bill alleges that, on the 13th of August, 1858, at La Crosse, in Wisconsin, the "Black River Falls Iron Company"—a corporation created by the laws of Wisconsin—executed and delivered their promissory note to Daniel Koehler and Caspar Bircher for $15,000, payable in nine month, to secure which a mortgage of even date, under the corporate seal, was also executed and delivered—which mortgage was witnessed, acknowledged, and recorded; that on the 21st day of September, 1858, Casper Bircher, by an instrument of writing under seal, for the consideration of $7,000, transferred to Jacob Koehler and Henry Pfiffner his interest in said note and mortgage, which was also witnessed, acknowledged, and recorded; and that the note and mortgage being over due and unpaid, the aid of the Court is asked to decree a foreclosure.

William M. Hubby, having filed his petition stating that he was a stockholder, and that in his opinion the directors did not intend to make defence, was allowed to appear and defend. Leave was given to the complainants to amend their bill so as to make Julius W. Haas and others, junior mortgagees, party defendants. Answers and replications were filed, proofs taken, and the cause was heard at the October Term, 1860. The Court dismissed the bill without prejudice and the complainants appealed.

The answers deny that the "Black River Falls Iron Company" ever executed under its corporate seal this mortgage, which denial, if sustained by the evidence, is decisive of this case. If the seal of the corporation was not affixed to the instrument by proper authority, but was surreptitiously obtained, then the deed is not the deed of the corporation, was not duly executed as the bill charges, and is not a legal mortgage, and cannot be fore closed as such.

The mere fact that a deed has the corporate seal attached, does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized. *Jackson* vs. *Campbell*, (5 Wendell, 572); *Damon* vs. *Granby*, (2 Pick., 345, 353); *Bank of Ireland* vs. *Evan*, (32 Eng. L. & E., 23); (Angell and Ames on Corporations, Sec. 223).

This mortgage had the corporate seal attached, and the presumption was that it was there rightfully, and the Court properly admitted it to be read in evidence; but the presumption thus raised was not conclusive, and parol evidence was admissible to overthrow it. *St. Mary's Church*, (7 Serg. & R., 530); *Berks & Dauphin Turnpike* vs. *Myers*, (6 Serg. & R., 16.)

The evidence is conclusive that the corporate seal was affixed to the mortgage wrongfully.

The mortgage purports to have been executed on the 18th of August, 1858, and signed by Charles Hauser, president, and J. M. Levy, Secretary *pro tem.*, who both swear that the corporate seal was not present, that they did not then, nor did they ever place the seal to the instrument, and have no knowledge how it came to be sealed. It was recorded shortly after being given, and no seal was to it.

Henry Richter, the secretary of the company, was the custodian of the seal, and testifies that he was not present when the mortgage was given, that he had the seal in his possession, and did not then, or at any time afterwards, affix the seal or authorize any one to do it for him.

When the defendants proved that neither the President nor the Secretary *pro tem.*, who signed the mortgage, nor the regular Secretary, who was the rightful custodian of the seal, had any knowledge of the way in which the mortgage became sealed, then the burden of proof was thrown on the complainants to show the circumstances under which the instrument was in fact sealed, and that it was rightfully and properly done.

Failing to do so, the conclusion is irresistible, that the seal was fraudulently abstracted from the lawful custodian of it, and wrongfully affixed to the mortgage.

The Revised Statutes of Wisconsin of 1849 were in force when this mortgage was given, and section 1 of chapter 59 prescribes the manner in which conveyances of real estate can be made, and it is as follows:

"Conveyances of lands or of any estate or interest therein may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or

by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other ceremony whatever."

Section 30 of this same chapter defines what is meant by conveyances as thus used, and is as follows:

"The term conveyance, as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands."

The mortgage, not having been sealed by the Iron Company or under its authority, was not executed in conformity with law, and is therefore invalid and of no force and effect as a legal mortgage.

It is argued, that if not a legal mortgage, it is an equitable one, and that the Court should not have dismissed the bill, but granted such relief as equity could give. But *this* bill seeks a foreclosure on the *sole* ground that a legal mortgage was given.

If the complainants have any rights under this instrument as an equitable mortgage, they can be tested, on a proper bill filed, in another suit.

The defendants in their answers further insist that this mortgage was given without authority of law and by fraud and collusion on the part of the directors.

The Black River Falls Iron Company was incorporated by the General Assembly of Wisconsin March 31st, 1856, to explore for minerals, and to mine, manufacture, and vend them. The administration of the affairs of the Company was lodged in the hands of directors chosen from the stockholders to hold office for one year, and to be controlled by the rules and by-laws adopted by the stockholders. The power to sell and mortgage, and procure a common seal, was given.

By-laws were adopted, fixing the place of business at New Danemora, Jackson County, limiting the number of directors to five, who should appoint a secretary having no vote, and pro

viding "that all documents, orders for the payment of money and receipts, to be valid, must be signed by the President and Secretary."

A stockholders' meeting was held May 19th, 1858, and the following memorandum was entered among the minutes: "May 19th, afternoon session—Mr. C. W. Schmidt makes the motion that the directory hereafter to be appointed shall be authorized to endeavor before all, the effecting of a loan of the highest possible amount, and in case of success to close it, and they are empowered to incumber for the same the works with buildings and appertaining lands, carried." At the same meeting a board of directors was elected, to wit: Charles Hauser, President, and John C. Fuhr, H. Pfiffner, Jacob Koehler, and John M. Levy, who chose Henry Richter as Secretary.

The Company was evidently embarrassed and in great need of money, and as the necessity was urgent and pressing the directors were instructed (neglecting all other business) to obtain as large a loan as they could, and to secure it by a mortgage on the lands and works. The stockholders clearly contemplated a loan of money to carry on their business, and if a loan could not be affected without real security, power to mortgage was given to the directors. No authority was given to them to secure pre-existing indebtedness, and certainly none to secure themselves in preference to other creditors.

Did these directors, as guardians of an important trust committed to their care, endeavor, in good faith, to accomplish the object which their principals so much desired?

They met on the 13th day of August, 1858. at La Crosse, and not at their usual place of business, and failed to notify their regular secretary, who had the records in his charge, and who had acted as secretary since the organization of the Company, to attend. No reason is assigned why the secretary was not notified, but as he was a large creditor, and was not to be favored, it is barely possible that the directors thought his presence would be embarrassing.

As the by-laws required that all instruments of writing should be signed by the president and secretary, it was found necessary

to appoint a secretary *pro tem.*, and one of the directors was selected, who, unlike the regular secretary, was fortunate enough to have his debt provided for.

A note and mortgage were given to Daniel Koehler and Caspar Bircher for $15,000, who were to let the company have $1,200 in money, and $800 in provisions, and to pay the following debts of the corporation:

Metzer, Koehler & Swab, a note and interest,		$3,570
John C. Fuhr,		1,900
Jacob Koehler,		1,256
John M. Levy, two notes and interest,	$2,528	
Less $124 charged,	124	2,404.

John C. Fuhr, Jacob Koehler, and John M. Levy, who were so lucky as to have their debts to the amount of $5,500 provided for, were themselves directors, and it might be inferred that Koehler, the director, was interested in the firm of Metzer, Koehler & Swab, but there is no evidence of it. It is a little singular that the mortgagees, in order to get security for the $2,000 which they agreed to advance, were willing to assume the payment of $9,130. Such is not the usual course of dealing with those who in good faith make advancements and require security. The mortgage was signed and delivered by Hauser, the president, to Koehler, the director, for the mortgagees, who were neither of them present, and who did not actually make the advancements in money or provisions until some time afterwards. And Bircher, one of the mortgagees, as if to fix the true character of this transaction beyond cavil, in a few weeks from the giving of the deed, for the expressed consideration of $7,000, transfers his entire interest to Koehler and Pfiffner, two of the directors. Instead of honestly endeavoring to effect a loan of money, advantageously, for the benefit of the corporation, these directors, in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests entrusted to their management. They hold a place of trust, and by accepting the trust are obliged to

execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation.

In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. "The directors are the trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."

Angel & Ames on corporations, edition 1861, sec. 312. *The Charitable Corporation* vs. *Sutton*, (2 Atkyns, 404.) *Robinson* vs. *Smith*, (3 Paige, 220.) *Hodges* vs. *New England Screw Co.*, (1 Rhode Island, 321.) *York and North Midland Railway Co.* vs. *Hudson*, (19 Eng. L. & E., 361.)

The decree dismissing the bill is affirmed.

MESA *vs.* THE UNITED STATES.

1. An appeal must be prosecuted by filing the record within the term next after the appeal is taken.
2. If it be brought up and filed after the first term has gone by, the appeal will be dismissed.

This was a California land case, in which an appeal had been taken by the claimant and one Clark, an intervenor. The appellants suffered a term to pass without filing a copy of the record in this Court, but at the second term brought up the transcript and had it docketed.

Mr. Gillet, of Washington City moved that the appeal be dismissed.

Mr. Magraw, of Pennsylvania, and *Mr. McDougall* of California, opposed the motion.

PER CURIAM.—Let this appeal be dismissed. It has not been prosecuted in the manner directed nor within the time limited by the Act of Congress, which requires that the transcript shall be filed at the next succeeding term after the appeal is taken

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MORAN ET AL. *vs.* THE COMMISSIONERS OF MIAMI COUNTY.

1. Acts of incorporation and other statutes granting special privileges are to be construed strictly, and whatever is not given in unequivocal terms is withheld.
2. But this principle must be applied with reference to the subject matter as a whole, and not in such manner as to defeat the general intent of the Legislature.
3. A county or other municipal corporation being authorized by statute to borrow money and issue bonds for the payment thereof, if the bonds be made and delivered reciting the facts, which show them to have been regularly issued, the county is estopped to deny their regularity or to assert that they were not made in conformity to the statute.
4. Such bonds, with interest warrants annexed, are commercial securities; the holder of them has a full title; and as against one who has taken them in good faith, the county cannot set up the equities which might have been available against the original payee.

Error to the Circuit Court of the United States for the District of Indiana.

Mr. Porter, of Indiana, for Plaintiffs in Error.

Mr. Ross, of Indiana, *contra.*

Mr. Justice WAYNE. This cause has been fully argued. It is an action to recover the interest in arrears on coupons annexed to bonds which were issued by Miami County, payable to the Peru and Indianapolis Railroad Company, or bearer, and which is declared in the bonds to be given for a loan of money. We

are relieved from the task of considering several of the arguments of counsel and the pleadings on the record, believing, as we do, that the defendants are estopped from denying the declarations as to the purpose and cause for which the bonds were issued, and that the coupon holders had a right to infer from the face of the bonds that they had been regularly issued by the County of Miami.

It is not a new case to this Court, either in its facts or the principle involved. The object of this Court has been in cases of a like kind, and it is still its purpose, to give to the contracts of counties for the purchase of railroad stocks and for borrowing money, to aid in the construction of railroads and other internal improvements, a strict interpretation of the legislative acts empowering them to do one or the other; but at the same time to give protection to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against their efforts to be relieved from the responsibilities of official acts, in putting such papers into circulation, for capitalists to invest money in them, on assurances that the principal and interest would be paid accordingly.

We repeat now, as appropriate to the subject-matter of the case in hand, as it was in the case in which this Court said it, that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. *Zabriskie* vs. *Cleveland, Columbus and Cincinnati Railroad Company*, (23 How., 400). In our construction of the Act of Pennsylvania to incorporate the Northwestern Railroad Company, the Court said, that neither privileges, powers, nor authorities, can pass, unless they are given in unambiguous words, and that an act giving special privileges must be construed strictly. That in case a sentence is capable of having two meanings, a construction must be given favorable to the public. However, that in applying those principles of construction, it must be done with reference to the

subject-matter contemplated by the Legislature as a whole, so as not to allow its manifest purpose and design to be defeated by denying the use of means by which the main object could only be accomplished.

In our leading case upon the subject, that of the *Commissioners of Knox County* vs. *Aspinwall et al.*, (21 How., 539), the suit having been brought for the interest due upon coupons annexed to one hundred and forty-two bonds, in which the main ground of defence was, that a Board of Commissioners had not power to execute them, and that on such account they were not binding upon the County of Knox, our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them.

In confirmation of such conclusion we then cited the case of the *Royal British Bank* vs. *Tarward*, (6 Ellis & Blackburne, 327), decided in 1856 in the Exchequer Chambers, in error from the Court of Queen's Bench, the decision of which we will now give in full, on account of the principle and its peculiar application to the pleadings in the case before us. Jervis, C. J. "I am of the opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I am inclined to think the question which has been principally argued, both here and in that Court, does not necessarily arise, and need not be determined. My impression is, though I will not state it is a fixed opinion, that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sums of money as shall, from time to time, by a resolution passed at a general meeting of the Company, be authorized to be borrowed, and the replication shows a resolution passed at a general meeting authorizing the directors to borrow on bond such sums for such periods and rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me to be enough. If that be so, the other ques

tion does not arise. But whether it be so or not, we need not decide, for it seems to us that the plea, whether we consider it a confession and avoidance, or a special *non est factum*, does not raise any objection to the advance as against the Company. We may here take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that, which on the face of the document, appeared to be legitimately done."

At an ensuing term of this Court we had under consideration the case of *Bissell* vs. *City of Jeffersonville*, and it was fully discussed by us in connection with the English and our own case of Aspinwall, &c. We said there: "When the contract has been ratified and affirmed, and the bond issued and delivered to the Railroad Company in exchange for stock, it was then too late to call in question the fact determined by the Common Council —and, *a fortiori*, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are holders for value. Certified copies of the proceedings were exhibited to the plaintiffs at the time they received the bonds, &c., and whether we look to the bonds or recorded proceedings, there is nothing to indicate any irregularity, or to raise a suspicion that the bonds had not been issued pursuant to lawful authority. We hold that the Company and its assigns, under the circumstances of the case, had a right to assume that they imported verity." It would be difficult to find cases more controlling of that before us than those which have just been cited.

The same ruling was made by the Court in the case of the *Commissioners of the County of Knox* vs. *Wallace*, (2 How., 546) It was substantially repeated in *Aspinwall et al.* vs. *The Commissioners of the County of Davis*. That was brought to this Court from the Circuit Court of Indiana upon a certificate of a

division of opinion between the judges. The points were, whether by the Act of Incorporation of the Ohio and Mississippi Railroad, and the amendments to it of January, 1849, any right to county subscriptions had been vested in the Company, to exclude the operation of the Constitution of Indiana, which took effect on the 1st of November, 1851, and whether the Railroad Company had acquired any such right to subscription of the defendant as was protected by the Constitution of the State. Both questions were answered negatively. But we said it was done reluctantly, for the subscriptions to the stock by the Board of Commissioners were made in good faith to the Railroad Company, and also sold by it, and purchased by the plaintiff in confidence of their validity.

With these cases on our minds, we will now proceed to give the facts and circumstances of the present case, that it may be seen whether there is any thing in them to take it out of our decisions.

The abstracts of it by both counsel, are so similar that either may be used without giving to the other any advantage.

It is an action of assumpsit, brought by the plaintiff in error, on interest warrants or coupons, annexed to fifteen bonds of the county of Miami for $1,000 each, bearing date the 21st of August, 1851, redeemable in ten years from the 1st of September following. The bonds were payable to the Peru and Indianapolis Railroad Company, or bearer, at the office of the Treasurer of Miami County, in Peru, bearing an interest of ten per cent. per annum, payable semi-annually at the same place. The suit is for a failure to pay coupons for the years 1857 and 1858, amounting to $3,000, the interest accrued before having been paid by the Railroad Company. It is averred in the declaration that the bonds had been issued by Miami County, in pursuance of powers conferred on its Board of Commissioners by the laws of Indiana, and particularly by an Act approved January 6th, 1849, entitled an Act to authorize the Commissioners of Hamilton, Miami, and Tipton Counties to borrow money. Howard County was afterwards permitted to borrow money The language of the act authorizes the loaning of

money to the Board to any amount not exceeding $50,000, from time to time, at any rate of interest, not more than ten per cent. per annum. The second section is, that all persons loaning money to the counties or either of them, are authorized to receive any rate of interest upon such loans as may be agreed upon, not exceeding ten per centum.

The Peru and Indianapolis Railroad Company was incorporated in January, 1846. The 28th section of the charter authorizes the County Commissioners of each county through which the road shall pass to take, by an order for either county, as much stock in it as they may think proper. After the act permitting the counties to borrow money had been passed, the Railroad Company, urged by the condition of its finances, appointed a committee to apply to the auditors of the Counties of Hamilton, Miami, and Howard, to call special sessions of the Boards of the Commissioners of their respective counties to consider proposals which they wished to make. In a meeting afterwards held, the committee stated that they were required to ask from the counties additional subscriptions to the stock of the Railroad Company. From the Counties of Hamilton and Miami respectively, twenty thousand dollars, and from Howard County ten thousand dollars. The committee then said that their subscriptions would be received, if the respective counties would issue bonds bearing ten per cent. interest per annum, redeemable in ten years, with coupons annexed to them, which the railroad would receive if the bonds were made payable to the company, or bearer, for the purpose of borrowing money upon them, to be applied to the payment of the stock which either of the counties should subscribe for. As a further inducement to the counties to do so, the committee stated that upon the subscription being made, and the bonds being issued, that the Railroad would issue stock to the county for its subscription, credited in full to the amount of its bonds; and for the issue of the bonds, that the President of the Railroad would execute an obligation binding the company to pay the interest annually upon the bonds as it became due, until the principal became payable and then the principal also; but that when

both principal and interest had been paid by the Railroad Company, that the counties would return to it the stock certificates which they had received when the bonds were issued if it did not wish to retain it. And it was further agreed between the parties, if the counties, or either of them, should at any time before the redemption of the county bonds by the railroad company elect to surrender to it its obligation, and assume the payment of the interest that shall accrue afterwards, and the principal also when it became due, that the stock issued to the counties should become absolute in their favor, entitling them to all future dividends on the stock. But that until such assumption had been undertaken and performed, that the stock was merely to be held as a security by the counties for the performance of the stipulation of the Railroad Company, but not entitling them to dividends, though it would give them the right to vote the stock in elections for directors. These proposals were considered by the Auditor and Board of Commissioners of Miami County. It resulted in an issue by them of twenty bonds, one thousand dollars each, in which it is declared in the bonds "that there is due to the President and Directors of the Peru and Indianapolis Railroad Company, or bearer, one thousand dollars from the County of Miami, payable in ten years from the first of September, 1851," this bond being issued for a loan of the amount to the county, as authorized by an act of the State of Indiana, permitting the Commissioners of Hamilton, Miami and Tipton Counties to borrow money. The coupons or interest warrants annexed to the bonds are in these words:

AUDITOR'S OFFICE, *Miami County, Peru, Indiana.*

The Treasurer of said county will pay the legal holder hereof one hundred dollars on the first day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Rail road Company. By order of the Commissioners.

IRA MENDENHALL, *County Auditor.*

The interest warrants, payable on the 1st September, 1858, are like the preceding; and others of the same kind, are annexed to the other fifteen bonds legally held by the plaintiff in error.

The bonds were delivered to the Railroad Company, were received by it in payment of the certificate of stock, and the County of Miami was credited with $20,000 upon the certificate The Railroad Company then offered them for sale, transferred them to purchasers as commercial securities by endorsement, and the plaintiff in error bought them in the full confidence that the consideration for which they had been issued was truly expressed on the face of the bonds. The county retained the stock certificate and voted it on the election for directors as its own. Thus matters stood between the Railroad Company and the County of Miami, both being satisfied with what had been done, and that they had acted conformably to their respective powers, until the Railroad ceased to pay to the holders the interest warrants.

Upon the trial of the case, the defendants filed a plea of non-assumpsit, and the plaintiff joined issue by a similiter. At the same time the defendants put in several pleas, affirming that several irregularities had been committed by the Board of Commissioners of Miami County and the Railroad Company, in their negotiation and proceedings for the issue of the bonds and interest warrants, by the force of which it is declared that the bonds were void at law, and that they were purchased by the plaintiff with notice of these irregularities.

We have examined these pleas critically, and find the facts stated in each to be imputations, only calculated to raise supposed equities between Miami County and the Railroad Company, in which the plaintiffs in error, as the legal holders of the bonds and coupons, can in no event have any concern, even if it be admitted that they had notice of such irregularities when they bought, as all of them relate to circumstances contradictory to the declarations upon the face of the bonds.

Though the proposals, or contract as it is termed in the record, for additional subscriptions of stock are confusedly expressed, there can be no doubt that it was its intention to solicit subscriptions, and that it was so understood by the Board of Commissioners of Miami County when it issued the bonds; and that in furtherance of such purpose, the parties proceeded to devise the

means to pay for the subscription by borrowing money. In doing that there was nothing irregular in the transaction. Both parties seem to us to have acted within their respective powers; the Railroad within its charter to allow the counties to subscribe for stock in it, and the County of Miami to do so and according to the power given to it to borrow money. When the Railroad undertook to pay the interest upon the treasury bonds and the principal also when that became due, it was substantially a loan to the county from the time of the execution of the bonds until their maturity, though it was provided that the county might then upon the cancellation of these bonds decline to return the certificate of stock which had been issued to it.

The narrative of the negotiation which led to the issue of the bonds and interest warrants, brings the case, by the declaration in the bond as to the object and purpose for which they were issued, so entirely within what we have shown to be the law in such cases as to the inference which may be made from the face of the bond, of its having been regularly executed by the party having authority to do it, that we are relieved from the task of considering much of the argument made to us by counsel; and from examining the special pleas which were put in by the defendant, or the reasoning of the Court upon the third and fourth pleas upon which it rested its judgment for the dismissal of the plaintiff's case. If the contract and bonds are considered in connection with the authority of the Board of Commissioners of Miami County to issue them, it must be obvious that several of the points presented to us by the counsel of the defendant do not arise in the case. For instance, whether the Board of Commissioners of Miami County had power to issue them at the time and for the purpose for which in was done, or that the bonds and interest warrants, by having been endorsed to the plaintiff by the Railroad Company were subjected to the revised statutes of Indiana, making certain promissory notes, &c., negotiable by endorsement thereon, so as to vest the interest in the contract to the assignee, and permitting the obligor to set up any defence to the obligation against the assignee, that he could have done against the original obligee. or that it was necessary to them

that the bonds were issued by virtue of a special statute, and if that did not exist, that the bonds may be held to be void.

It is true that all of these points were as well argued by the counsel of the defendants as the circumstances of the case permitted, but in every instance, either of argument or of pleading, the point of estoppel, as made by the plaintiff's counsel in the Court below, and renewed here by him with vigor by the citation of many cases, was not directly met by the counsel of the defendant. The first point of the plaintiff's counsel was, that even if the bonds had been issued irregularly, and not in strict conformity with the power of the county to borrow money, that the defendant is, nevertheless, estopped by the bonds themselves, which, on their face, express that they were issued for a loan of the amount to the county, as authorized by the Act of the General Assembly to borrow money, and that such bonds being habitually received and passed as commercial securities, and being *bona fide* in the hands of the plaintiff, that they were entitled to recover the amount of interest sued for, notwithstanding there might be equities between the original parties to the transaction. It is not necessary for us to follow out the plaintiff's argument in this particular, thinking it, as we do, conclusive. We think that the bonds in this case, with interest warrants annexed, are commercial securities, though they are not in the accustomed forms of promissory notes or bills of exchange; that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them, and that the original maker under such circumstances has no equity to prevent the recovery of the interest.

But the real point in this case, as made by the counsel of the plaintiff in error, and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the Board of Commissioners of Miami County by order or resolution, pursuant to the statute authorizing the County to borrow money, passed at a regular meeting of the Board, to be used by the Peru and Indianapolis Railroad, payable to the Company, or bearer, for a loan to the County that

the *bona fide* holders of the bonds, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the County of Miami is estopped in a suit for the recovery of the interest from denying by pleas that its bonds had been issued to the Peru and Indianapolis Railroad for a loan of money to the County of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel in pais upon the defendants in this suit. In support of this conclusion, we cite the following cases: *Girard* vs. *Bradley*, (7 Ind., § 600); *Reeves* vs. *Andrews*, (Ibid., 207); *Frances* vs. *Porter*, (213); *May* vs. *Johnson*, (3 Ind., 448); *Trimble* vs. *State*, (4 Black, 435); (8 Blackford, 258); *Ryan* vs. *Vanladingham*, (7 Ind., 416; 24 How., 375); (23 How., 381); (29 Connecticut Rep.); *Society of Saving* vs. *City of New London*, (103); (1 Vesey, senior, 123, 8 Blackf., 47). It is the opinion of this Court that the defendant is estopped from setting up the defences taken as set forth in the transcript of the record of this case, and that the judgment of the Court below sustaining the demurrer should be, and is hereby reversed and annulled, and that the case should be remanded to that Court, with directions to award a *venire facias de novo*.

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A general decree of a Court of Equity, that funds not yet collected but secured by judgments, shall be distributed among certain parties, and appointing a master to state an account, is not a final decree. *Ogilvie* v. *Knox Insurance Company*, 539.

An appeal from such a decree will be dismissed as premature. *Ib.*

The Court cannot make a final decree until after a report by a master and an ascertainment of all the facts. *Ib.*

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If the tenant claimed the right to remain under an agreement with the purchaser, his remedy was a bill for an injunction, on which a final decree could have been made and an appeal taken. *Ib.*

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Where the judgments and decrees in equity of State Courts are, by the laws of the State, liens upon land, decrees in admiralty of the Courts of the United States, have the same character and are equally binding. *Ib.*

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Secret instructions from the equitable to the legal owner, do not affect the purchaser without notice. *Ib.*

The equitable owner must prove that the purchaser was cognizant of such instructions, to make them avail against him. *Ib.*

Such proof must be fuller where the sale was for a fair price, than where the bargain was hard and unequal. *Ib.*

PRIZE. (See Blockade.)

PUBLIC LANDS.

Power of this Court to review the judgments of the General Land Office. *Lindsay* v. *Hawes*, 554.

Where a party purchases public land, and by a mistake in the Government survey, discovered after he has built his house, finds himself outside the limits of the tract for which he has paid, the Commissioner of the Land Office cannot set aside the sale. *Ib.*

The Government is bound by the original survey. *Ib.*

Where the house of a pre-emptor is built on the line dividing two quarter sections, his residence in it gives him a pre-emption right in either. *Ib.*

PURCHASE.

The rule of law where a party purchases property under the direction of or on behalf of another. *Rothwell* v. *Dewees*, 613.

The rule where one of two devisees or tenants in common, holding under an imperfect title, buys in the outstanding one. *Ib.*

The reason for this rule. *Ib.*

It is applicable as well to the husband of a tenant in common as to one of the immediate co-partners. *Ib.*

REAL ESTATE.

Interpretation of the Statute of Ohio, authorizing a party in possession of real estate to bring suit against a party who claims it to determine the title. *Parrish's Lessee* v. *Ferris*, 606.

The judgment of the Court in such a case settles plaintiff's title as well as that of defendant. *Ib.*

SALE.

The equitable owner of property cannot divest the title of a *bona fide* purchaser without notice, who has bought from an agent to whom the equitable owner has secretly confided the legal title.

Calais Company v. *Van Pelt's Administrator*, 372.

Secret instructions from the equitable to the legal owner do not affect such a purchaser unless it can be shown that he was cognizant of them. *Ib.*

The proofs which go to charge him with notice must be fuller where the sale was for a fair price than where the bargain was hard and unequal. *Ib.*

STATUTE.

The interpretation of a State statute by its highest Court is as binding on the United States Courts as the text.

Sumner v. *Hicks*, 532; *Leffingwell* v. *Warren*, 599.

Where such Court changes its views, this Court follows the latest adjudication. *Ib.*

How acts of incorporation and other statutes granting special privileges are to be construed. *Moran* v. *Miami Commissioners*, 722.

Qualification of the general rule. *Ib.*

TAXATION.

Stock of the United States not taxable by State laws.

People of New York v. *Commissioners of Taxes*, 626.

A State law for such purpose unconstitutional, whether the tax is imposed on United States stock *eo nomine*, or upon the aggregate property of one who holds such stock. *Ib.*

A tax upon the nominal capital of a bank, without reference to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and is not a burden imposed on the property itself. *Ib.*

The law of New York concerning bank taxation—what it is—and how it is to be construed. *Ib.*

The capital of a bank invested in United States stocks is not liable to State taxation. *Ib.*

TAXATION—(Continued.)

This Court is without power to control or restrain the taxing power of a State exercised within Constitutional limits.

People of New York v. *Commissioners of Taxes*, 200.

Why a State tax upon the loans of the Federal Government is unconstitutional. *Ib.*

A State, by the act of her Legislature, may delegate to a municipal corporation the power to issue bonds and to tax property to pay them, without abridging her own right to regulate and modify such tax.

Gilman v. *Sheboygan City*, 510.

Such an act is not a contract with the bondholders. *Ib.*

Even if held to be a contract the tax-payers cannot complain while the bondholders are silent. *Ib.*

Abridgment of the sovereign powers of a State by an act of her Legislature is not to be assumed. *Ib.*

A law authorizing a public corporation to borrow money and pay it by a tax does not take private property for public purposes, and is constitutional. *Ib.*

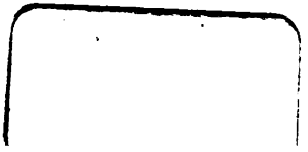
The clause of the Constitution which forbids such a taking is a limitation, not on the taxing power, but on the right of eminent domain. *Ib.*

TRUST.

The rule of law where a party purchases property under direction of or on behalf of another. *Rothwell* v. *Dewees*, 618.

The rule where one of two devisees or tenants in common holding under an imperfect title buys the outstanding one. *Ib.*

The reason for this rule. *Ib.*

It is applicable as well to the husband of a tenant in common as to the immediate co-partners. *Ib.*

WILL. (See Devise.)